Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAWRENCE SUTTER,

Petitioner,

v.

STEVEN MARK LASAR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit upheld a contempt citation and other severe sanctions imposed against Lawrence Sutter, an attorney for Ford Motor Company, based on comments he made during his opening statement and an alleged omission in his *pro hac vice* application. The Ninth Circuit acknowledged that in imposing the sanctions under its "inherent power," the district court had denied Mr. Sutter the procedural protections afforded in a criminal contempt proceeding as well as the protections provided by the court's Local Rules, but held that the contempt was civil in nature and that the district court could rely on its inherent power even when the Local Rules were fully adequate to address the conduct in question.

The following questions are presented:

1. Whether a district court may rely on its inherent power to sanction where the conduct may be fully and adequately addressed under a sanctioning provision in a statute or rule.

2. Whether a contempt sanction is criminal, rather than civil, when it is based on completed conduct and intended to punish, stigmatize and reprimand the contemnor.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below included Steven Mark Lasar, Ford Motor Company, and Lawrence Sutter.

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PETITION FOR A WRIT OF CERTIORARI

Lawrence Sutter respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion (Pet. App. 1a) is reported at 399 F.3d 1101. The opinion of the district court (Pet. App. 30a) is reported at 239 F. Supp. 2d 1032.

JURISDICTION

The Ninth Circuit filed its opinion on March 3, 2005, and denied petitioner's timely request for rehearing en banc on April 19, 2005. Pet. App. 84a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

The relevant provisions of the Local Rules for the District of Montana are reproduced in the Petitioner's Appendix, Pet. App. 86a-98a.

STATEMENT OF THE CASE

This case dramatically illustrates the dangers of a district court wielding an unchecked "inherent power" to sanction. Attorney Lawrence Sutter was accused of violating an order *in limine* during his opening statement and of omitting information in his *pro hac vice* application. Although the Montana Local Rules give extensive procedural protections to attorneys accused of omissions in their application, including the right to an independent investigation and prosecutor, the district court bypassed its own Local Rules by relying on its "inherent power" to sanction, stripping Mr. Sutter of his admission *pro hac vice*, and permanently banning him from ever again appearing in the Missoula Division of the federal court. The court also issued a contempt citation against him for the alleged violation of the order *in limine*, again relying on its inherent power and denying Mr. Sutter the procedural protections afforded a criminal contemnor. The court im-

posed these sanctions, as well as severe monetary sanctions, in a lengthy, published order attacking Mr. Sutter's character and his fitness as a lawyer. *See* 239 F. Supp. 2d 1032, Pet. App. 30a.

The Ninth Circuit vacated the permanent ban, but otherwise upheld the district court's order in full. 399 F.3d 1101, Pet. App. 1a. It held that the district court was entitled to jettison the procedural protections contained in its own Local Rules when sanctioning under its inherent power, thereby worsening an existing circuit split over whether a district court may invoke its inherent power when the conduct in question could be addressed by the sanctioning provisions in statutes or rules. *Id.* at 20a-21a. The Ninth Circuit also held that the contempt citation was civil in nature and thus did not require the protections that attach in a criminal proceeding, *id.* at 16a-18a, thus creating a conflict with the D.C. Circuit over whether this type of freestanding contempt citation based on a past failure to comply with a court order is civil or criminal.

* * *

1. Petitioner Lawrence Sutter represented Ford Motor Company in this product liability case tried before Judge Donald Molloy in the United States District Court for the District of Montana. Mr. Sutter is a nationally-known trial lawyer who has tried over 50 cases and recently founded his own 30-person firm based in Cleveland. Ninth Circuit Excerpts of Record ("ER") 93-94. He was selected in 2002 by the *National Law Journal* as one of the top 40 lawyers in the country under the age of 40, and was featured by the same publication in an article profiling ten of the country's top litigators. *Id.* He is a member in good standing of the bars of Ohio and Tennessee, and was admitted *pro hac vice* in this case. *Id.* at 94-95.

Respondent Steven Lasar was driving home late at night on a rural road in Montana when he lost control of his Ford Ranger pickup and rolled it over. Pet. App. 3a. He sued Ford, alleging that the Ranger's door latch was defective in

that it allowed the pickup's door to open during the rollover, resulting in his being thrown from the vehicle. *Id.* Prior to trial, respondent moved *in limine* to exclude evidence of his alcohol use the day of the accident. He also moved to exclude evidence that he was not wearing his seatbelt when the accident occurred. The district court granted both motions. *Id.*

During his opening statement, Mr. Sutter described how respondent spent the day of the accident:

> At about 5:00 that morning, Mr. Lasar got out of bed and went hunting for the morning. Some time in the afternoon, he met up with some of his friends and spent the day playing pool, visiting some local establishments. Somewhere around 10:00 that night, he made the decision to drive himself home. He got into his car and he began his way back to his homestead.

Pet. App. 4a. Later in his opening statement, Mr. Sutter described what was occurring within the vehicle during the rollovers:

> Now, inside the vehicle, something else was going on; Lasar was what we call a free-floating body. His body was banting about inside the car as it was rolling over. And because of what happens during the rollover, something all of us learned in high school and most of us tried to forget, centrifugal force. All that is, is something spinning around like a yo-yo on a string; it wants to keep going outward.

Id.

Respondent's counsel did not object during Mr. Sutter's opening statement. Rather, counsel waited until Mr. Sutter concluded, then requested a sidebar and later, at the end of the day's proceedings, argued to the court that these two remarks had violated the pretrial rulings. ER25-26. Respon-

dent's counsel did not request a mistrial, but simply asked "that the Court admonish counsel to stay within the letter and spirit of the Court's rulings and to avoid comments like that, and perhaps we can deal with some sort of instruction later on." *Id.* at 27.

Although respondent's counsel had not requested it, the court suggested *sua sponte* that it would grant a mistrial if respondent wished and would order Ford to pay his costs. ER27. The next morning, respondent accepted the court's invitation and the court immediately granted a mistrial. The court stated that it would impose sanctions, under its inherent power, to punish Mr. Sutter for attempting "to win this case at all costs," and directed all counsel to return to court two days later for a sanctions and contempt hearing. ER61-63.

2. When the court reconvened, the parties began by arguing over the proper amount of a monetary sanction. ER68-91. The court then stated that it would consider "whether or not Mr. Sutter should be held in contempt of the Court for the willful violation of the orders *in limine*." *Id.* at 91. Mr. Sutter was placed under oath and questioned by his co-counsel.

In the course of that questioning, Mr. Sutter volunteered that several years ago in a case called *Kaffeman*, a state trial judge in Ohio had ordered that he be briefly confined (once for 10 minutes and once for 20) for attempting to place objections on the record. ER94-95, 119. Mr. Sutter explained that the Ohio Supreme Court reviewed the trial judge's behavior and exonerated Mr. Sutter by agreeing that the trial judge had acted unreasonably and disqualifying her from further proceedings. *Id.* at 95. *See Kaffeman v. Maclin (In re Disqualification of Cleary)*, 723 N.E.2d 1106, 1108 (Ohio 2000). Mr. Sutter further noted that the Ohio Supreme Court subsequently suspended the state judge from the practice of law for misconduct while on the bench in an unrelated case. ER95.

Finally, he testified that he did not intend to violate either of the orders *in limine*, and that he did not believe he had

violated either order at the time he made his opening statement. ER98-100 ("I spent a great deal of time drafting this language because I thought that this was within the bounds of the Court's ruling. . . . I was trying to stay safely within the bounds of the ruling by the Court.").

Although *Kaffeman* had never been mentioned before Mr. Sutter raised it himself that morning, the district court revealed that it had already obtained and read the opinion. ER109.[1] The court agreed with Mr. Sutter that "[c]ertainly there's an implication from reading" the opinion "that the [Ohio Supreme] Court felt [the trial judge] should not have held you in contempt. . . . The inference is when she locked you up, she shouldn't have done it." *Id.* at 119, 123-24. But the court stated that it nonetheless believed that Mr. Sutter should have disclosed the Ohio proceedings in his *pro hac vice* application to the Montana court pursuant to Local Rule 83.3(e)(3)(E), which provides that an applicant must disclose:

> whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent.

Pet. App. 88a. The court acknowledged Mr. Sutter's belief that he had been vindicated by the Ohio Supreme Court, but stated that "I don't seem to read the case the way you do." ER118. The hearing ended and the court took the matter under advisement.

3. Nearly three months later, the district court issued an order citing Mr. Sutter for contempt, stripping him of his *pro hac vice* admission, and permanently banning him from ever again appearing in the Missoula Division of the District of

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[1] The court also revealed that it had researched and uncovered back issues of the *National Law Journal* in which Mr. Sutter had been quoted discussing his work in other cases involving seatbelt use. ER116-17.

Montana. Pet. App. 52a-53a. The order also imposed more than $66,000 in monetary sanctions against Ford and Mr. Sutter, directing that $61,397.50 of that total be imposed jointly and severally against Ford and Mr. Sutter, and payable to respondent's counsel. *Id.* at 52a. The remaining $5,496.15 was imposed against Ford alone, and payable to the court. *Id.* The court twice stated that it was relying upon its inherent power in imposing all of the sanctions. *Id.* at 35a ("In this case, I rely upon my inherent power in resolving the issues before me."); *id.* at 37a ("Again, I am relying on my inherent authority in entering the orders in this case that follow.").

The opinion—which the district court ordered published—contained extensive commentary by the court about Mr. Sutter's fitness to practice law and his general character. *See, e.g.*, Pet. App. 52a ("The law has no room for frustrated advocates."); *id.* ("At some point Lawrence Sutter needs to reflect on what it is he does, and what it is he should do."); *id.* at 35a (accusing Mr. Sutter of "relativist ethics" and asserting that he "lacks the candor and integrity to appear in this Court *pro hac vice*"). The court denied Mr. Sutter and Ford's motion for reconsideration. Pet. App. 81a.

The underlying dispute later settled, but Mr. Sutter and Ford appealed the sanctions order to the Ninth Circuit.

4. On March 3, 2005, a three-judge panel of the Ninth Circuit issued an opinion affirming almost all of the sanctions.[2] The court began by recognizing that when a contempt citation is criminal in nature, the contemnor is entitled to the same protections afforded in criminal trials, including an independent prosecutor, proof beyond a reasonable doubt, and a jury trial. Pet. App. 13a. But the court concluded that the contempt sanction imposed in this case was civil, not criminal, holding that "[s]o long as the court did not impose seri-

[2] The only sanction the panel reversed concerned the district court's effort to permanently bar Mr. Sutter from ever appearing in any case in the Missoula Division, which the panel agreed was an abuse of discretion and a violation of Mr. Sutter's due process rights. Pet. App. 20a.

ous criminal penalties, due process did not require" the protections applicable in a criminal proceeding. *Id.* at 17a. The court concluded that Mr. Sutter was entitled to nothing more than notice and an opportunity to be heard before the contempt citation could issue. *Id.* at 18a.

The court of appeals also approved the district court's decision to sanction Mr. Sutter under its inherent power and to bypass the sanctioning procedures set forth in the Local Rules. *See* Mont. L.R. 83.14(f)-(j) (providing for independent prosecutor and "clear and convincing" standard of proof in cases where attorney is suspected of omitting material information from *pro hac vice* application) (reproduced at Pet. App. 93a-95a). The Ninth Circuit did not disagree that the Local Rules could have been used to sanction Mr. Sutter's alleged conduct. Rather, the court concluded that, under *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991), "the inherent power of a court can be invoked *even if* procedural rules exist which sanction the same conduct." Pet. App. 21a (emphasis added and quotation omitted). The court noted that the Local Rules contained provisions stating that they were not intended to restrict a court's inherent power to sanction. Pet. App. 21a (citing Mont. L.R. 83(a) & (b)). Thus, the court concluded, the district court was free to disregard the sanctioning provisions in its Local Rules, and impose sanctions under its inherent power, in any case where it deemed use of the inherent power "appropriate." Pet. App. 21a.[3]

On April 19, 2005, the Ninth Circuit denied rehearing en banc. Pet. App. 84a.

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[3] During the pendency of the appeal, Mr. Sutter sought and obtained an order from an Ohio court clarifying that he had *not* been held in contempt in the *Kaffeman* case because the judge never journalized a finding of contempt, as required under Ohio law. Although this order established that Mr. Sutter was absolutely correct in believing that he had not actually been held in contempt, the Ninth Circuit refused to consider the Ohio court's ruling on the basis that it supposedly was a "factual finding[ ]." Pet. App. 26a n.14.

REASONS FOR GRANTING THE WRIT

This Court should grant review to resolve the circuit split on the question whether, under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), a district court may sanction using its inherent power when there are statute- and rule-based sanctioning provisions that are fully capable of addressing the conduct at issue. Review is further warranted to resolve the conflict between the decision below and the D.C. Circuit's decision in *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003), which held that a free-standing contempt citation based on a past failure to comply with a court order is criminal, not civil, in nature.

This Court has long warned of the dangers of the inherent power to sanction. In *Chambers*, 501 U.S. at 43-44, the Court emphasized that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion" and noted that it had held in *Ex parte Burr*, 9 Wheat. 529, 531 (1824), that these powers "ought to be exercised with great caution." In *Degen v. United States*, 517 U.S. 820, 823 (1996), the Court relied on *Chambers* in stating that "[t]he extent of these [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." Particularly where, as here, the district court *sua sponte* announced its intent to impose sanctions that had not been requested by respondent's counsel, then acted as both prosecutor and judge, there is a high potential for abuse and unfairness. *See Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir. 1998) ("A troublesome aspect of a trial court's power to impose sanctions . . . is that the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed.").

The district court in this case invoked its inherent power selectively. It sanctioned Mr. Sutter for violating Montana

Local Rule 83.3(e)(3)(E) by omitting material information from his *pro hac vice* application, but relied on its inherent power to evade the procedures in Local Rule 83.14 that were specifically established to punish violations of Local Rule 83.3(e)(3)(E). This case provides a perfect example of how a district court may seek to circumvent the procedural and substantive protections established in rules and statutes by invoking its inherent power.

The risk of a court imposing sanctions under its inherent power, and disregarding the procedures and requirements enshrined in rules and statutes, poses special problems for attorneys admitted *pro hac vice*. Courts have recognized the potential for discrimination against out-of-state attorneys trying cases in unfamiliar courtrooms, and have held that "[p]ro hac vice counsel, once admitted, cannot be disqualified under standards and procedures any more stringent than those imposed upon members of the local bar." *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. 1996) (brackets, ellipses and citation omitted). Indeed, the very purpose of the federal courts' diversity jurisdiction "was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides." *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898). Yet the district court expressly noted Mr. Sutter's out-of-state status in imposing sanctions for his alleged violation of the order *in limine*, telling him that "[y]ou're not the first lawyer that's been frustrated with Montana law" in product liability cases, and emphasizing repeatedly in its published order that "no sanction is imposed on . . . Ford's Montana counsel." ER125; Pet. App. 39a n.7, 44a n.9. *See also Cyphers v. Fuji Heavy Indus. Co.*, 32 F. Supp. 2d 1199 (D. Mont. 1998) (published opinion denying admission *pro hac vice* to out-of-state product liability law firm Bowman and Brooke).

The consequences to Mr. Sutter have been severe. He has been branded with a contempt citation and stripped of his *pro hac vice* admission, penalties that will forever harm his ability to attract clients and practice his profession. These are substantial punishments for any attorney, but they are

particularly severe for an attorney like Mr. Sutter, whose career is devoted to trying cases in jurisdictions throughout the nation, and who routinely must petition courts for permission to appear *pro hac vice*. Indeed, Mr. Sutter's opponents in other cases now regularly attempt to introduce the district court's order in this case as a means of discrediting Mr. Sutter and preventing him from gaining admission to the local court. *See* Ninth Circuit Brief of Appellee at 18-20.

In upholding the sanctions in this case, the Ninth Circuit affirmed a district court that ran roughshod over its own Local Rules in an effort to punish Mr. Sutter. This Court should grant review and hold that the inherent power may fill in the interstices—and reach conduct that could not otherwise be punished under existing statutes and rules—but should not be construed as a means of *circumventing* the limitations and procedural protections enshrined in the statutes and rules.

I. THE CIRCUITS ARE SPLIT OVER WHETHER A COURT MAY SANCTION UNDER ITS INHERENT POWER WHEN THE CONDUCT CAN BE ADEQUATELY SANCTIONED UNDER STATUTES OR RULES.

The decision below worsens an existing circuit split. The approach followed by the Ninth Circuit, as well as the Sixth Circuit—that the inherent power of a court can be invoked even if statutes or rules exist that can fully and adequately sanction the conduct at issue—conflicts with the approach followed by the Third and Fifth Circuits. Those courts hold that where statutes or rules exist that can adequately sanction the conduct, a district court must rely on them and *cannot* invoke its inherent power.

Much of the confusion arises from differing interpretations of this Court's ruling in *Chambers*. That case involved a district court's imposition of sanctions under its inherent power rather than under the sanctioning provisions in the Federal Rules of Civil Procedure or the United States Code. This Court began by stating that a federal court is not "for-

bidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the [federal] Rules." But it then immediately qualified this statement by holding that the inherent power could be used "safely" only upon a determination that "neither the statute nor the Rules are up to the task":

> [W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50. In *Chambers*, some but not all of the conduct at issue was covered by the sanctioning provisions in the federal rules. As the Court explained, "[m]uch of the bad-faith conduct by Chambers was beyond the reach of the Rules" and even "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." *Id.* at 50-51. Consequently, the Court held that the district court properly invoked its inherent power. *Id.*

Chambers thus made clear that a district court may use its inherent power to sanction when it determines that statutes or rules are not "up to the task" and cannot reach the conduct in question. *See* 501 U.S. at 46 ("At the very least, the inherent power must continue to exist to fill in the interstices."). But the decision left open the question whether a district court is free to use its inherent power even when the statutes and rules *are* "up to the task" and *can* reach the conduct in question.

The Circuits have answered this question differently. Some courts, including the Ninth and Sixth Circuits, emphasize the statement in *Chambers* that a court is not "forbidden to sanction" under the inherent power "simply because that conduct could also be sanctioned" under statutes or rules. These courts permit use of the inherent power even when

statute- or rule-based sanctions are available and fully adequate. Other courts, including the Third and Fifth Circuits, focus on the statement that the inherent power can be "safely" invoked only when the court determines that "neither the statute nor the Rules are up to the task." These courts permit use of the inherent power only when the district court determines that statutes or rules are incapable of reaching the conduct at issue.

This split has been acknowledged by courts and commentators alike. *See, e.g.*, *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 534 (6th Cir. 2002) (Gilman, J., dissenting) (canvassing cases and stating that "a number of our sister circuits have rejected [the Sixth Circuit's] interpretation of *Chambers*"); Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 69-70 (Supp. 2005) (noting divergent approaches on this question). Review by this Court is warranted.

A. The Ninth And Sixth Circuits Permit Use Of The Inherent Power Even When Statutes Or Rules Are Directly Applicable And Fully Adequate.

1. The district court's sanctions and contempt order was based in large part on the alleged omission in Mr. Sutter's *pro hac vice* application. But in sanctioning Mr. Sutter, the court did not follow the procedures set forth in Local Rule 83.14, which specifically address situations where an attorney is accused of omitting material information from his *pro hac vice* application. Instead, the court invoked its inherent power. *See* Pet. App. 35a ("In this case, I rely upon my inherent power in resolving the issues before me."); *id.* at 37a ("Again, I am relying on my inherent authority in entering the orders in this case that follow.").

Local Rule 83.14(b)(5) provides that an attorney may be disciplined for "misrepresentation or concealment of a material fact made in . . . a pro hac vice or reinstatement application." The Rule then sets forth the procedure that must be followed in such cases: the Chief Judge of the District must

appoint an investigator and, if the results of the investigation so warrant, an independent counsel to prosecute the allegations of misconduct. *See* Local Rule 83.14(f)-(j). The Rule further provides that the respondent attorney is entitled to numerous procedural protections, such as a complaint that is "sufficiently clear and specific to inform the respondent attorney of the alleged misconduct," the right "to present evidence or argument in mitigation," and application of a "clear and convincing" standard of proof. Local Rule 83.14(*l*).

It is undisputed that Mr. Sutter was not afforded all of these protections. There was no independent investigation and no independent counsel; the "investigation" and "prosecution" were carried out by the district court itself. Nor is it disputed that the Local Rules were fully "up to the task" of sanctioning Mr. Sutter if indeed he omitted material information from his *pro hac vice* application. The Ninth Circuit, however, excused the district court's failure to follow the rules the court itself enacted to address this precise situation, upholding the sanctions as a proper exercise of its inherent power. Pet. App. 20a-21a.[4]

Quoting *Chambers*, the Ninth Circuit emphasized "the Supreme Court's position that 'the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.'" Pet. App. 21a (quoting 501 U.S. at 49). Thus, in the Ninth Circuit's view, adherence to the Local Rules is optional; they merely "provid[e] a procedure for referring disciplinary matters to the Chief Judge *if the presiding judge decides such a procedure is appropriate*." Pet. App. 21a (emphasis added). If, however, the presiding judge decides that following the Local Rules is not "appropriate" in a given case, the judge may rely on his or her "inherent authority to impose sanctions and hold an attorney in con-

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[4] To the extent the court based its sanctions order on Mr. Sutter's alleged violation of the order *in limine*, the district court also acknowledged that such conduct could be sanctioned under the Local Rules. *See* Pet. App. 37a ("Local Rule 83.14(b) & (c) allows the court to sanction an attorney for violating any court order.").

tempt." *Id.* The Ninth Circuit also noted that the Local Rules themselves did not purport to limit the district court's ability to impose sanctions under its inherent power. *See id.* (quoting provisions of Local Rule 83.14 that "[n]othing contained in this Rule shall be construed to limit or deny the Court such powers as are necessary to maintain control over proceedings before it, such as contempt power" and "[n]othing in this section precludes the Court or any judge of the Court from assessing sanctions for violations of local practice and procedure rules or other applicable statutes and rules").[5]

In sum, although there is no dispute that the sanctioning provisions in the Local Rules were entirely adequate to address the conduct at issue in this case, the Ninth Circuit held that under *Chambers*, the district court was still free to sanction under its inherent power.

The Ninth Circuit applied the same rule in *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001), which the district court in this case cited as giving it the "discretion to determine upon which ground I will rely in imposing sanctions"—*i.e.*, a statute- or rule-based ground, or the inherent power. Pet. App. 35a. In *Fink*, the Ninth Circuit rejected the argument that "the district court erred in basing its decision on inherent authority and declining to consider sanctions available under Rule 11 or 28 U.S.C. § 1927." Citing *Chambers*, 501 U.S. at 50, the court held that "[i]t is well settled . . . that the district court may, in its informed discretion, rely on inherent power rather than the federal rules or § 1927" even when the rules or statute are capable of sanctioning the conduct at issue. *Id.*

2. The Sixth Circuit follows the same approach. In *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501, 514 (6th Cir. 2002), the court held that "[i]n

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[5] Even assuming *arguendo* that these provisions "preserve" the district court's inherent power to sanction, that just begs the question whether the inherent power may properly be exercised where, as here, a rule-based sanction specifically governs the alleged conduct.

our view, *Chambers* should be read broadly to permit the district court to resort to its inherent authority to sanction bad-faith conduct, even if the court has not expressly considered whether such conduct could be sanctioned under all potentially applicable rules or statutes." The court stated that "there is nothing in *Chambers* that explicitly requires a court to determine whether the conduct at issue is covered by one of the other sanctioning mechanisms" and "[w]e are reluctant to impose a wooden requirement where the district court needs the discretion and flexibility to exercise its inherent authority to address various impermissible litigation practices." *Id.* (quotation omitted).

The dissent criticized the majority for "reinterpreting *Chambers* so as to eviscerate the requirement that the district court's inherent powers should be properly invoked only when the civil rules are not 'up to the task' of addressing the conduct at issue." 307 F.3d at 533 (Gilman, J., dissenting). The dissent explicitly recognized that "a number of our sister circuits have rejected [the majority's] broad interpretation of *Chambers*," and that "[t]hese federal courts of appeals instead require district courts to consider whether the sanctions can be applied pursuant to any applicable rule or statute before invoking the court's inherent powers." *Id.* at 534 (collecting cases).

B. The Third and Fifth Circuits, In Contrast, Hold That The Inherent Power May Be Used Only When Statute- Or Rule-Based Sanctions Are Inadequate.

The approach followed by the Ninth and Sixth Circuits directly conflicts with the approach followed by the Third and Fifth Circuits. Those courts hold that, under *Chambers*, the inherent power may be used only in cases where the sanctioning provisions in rules and statutes cannot adequately address the conduct at issue. This interpretation of *Chambers* has been endorsed by one of the leading treatises on sanctions. *See* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 428 (3d ed. 1999) ("The *Chambers* analysis

leads to the conclusion that if statutory or rules-based sanctions powers are entirely adequate, they should be invoked, rather than the inherent power.").

1. In *Klein v. Stahl GMBH & Co.*, 185 F.3d 98, 110 (3d Cir. 1999), the Third Circuit vacated sanctions imposed under the inherent power because the district court had not considered whether the conduct could have been sanctioned under a statute or rule. Construing *Chambers*, the court held that "a trial court should consider invoking its inherent sanctioning powers *only* where no sanction established by the Federal Rules or a pertinent statute is 'up to the task' of remedying the damage done by a litigant's malfeasance." *Id.* at 108 (quoting *Chambers*, 501 U.S. at 50) (emphasis added). The court noted that in *Chambers*, "[a]ll nine Justices . . . agreed on the minimum proposition that a federal district court considering sanctions should first turn to the Federal Rules and applicable statutes." 185 F.3d at 109 n.8.

The Third Circuit applied the same rule in *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3d Cir. 2001), where it again reversed a district court for imposing sanctions pursuant to its inherent power when the court had failed to consider whether the conduct could have been sanctioned under a statute or rule. The Third Circuit recognized that in *Klein*, it had "squarely held that before utilizing its inherent powers, a district court should consider whether any Rule- or statute-based sanctions are up to the task." *Id.* at 785. It explained that it had "interpreted *Chambers* to mean that the Rules are not 'up to the task' when they would not provide a district court with the authority to sanction all of the conduct deserving of sanction." 243 F.3d at 785 (quotation marks omitted). Accordingly, because "[i]n this case, the District Court did not consider whether any such sanctions . . . would have sufficed to deal with any misconduct that occurred in this case," the inherent power sanctions could not stand. *Id.*

2. The Fifth Circuit follows the Third Circuit's approach. In *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d

290 (5th Cir. 1997), the court upheld inherent power sanctions imposed on a party who engaged in abusive conduct during his deposition. The court held that "[w]hen a party's deplorable conduct is not effectively sanctionable pursuant to an existing rule or statute, it is appropriate for a district court to rely on its inherent power to impose sanctions." *Id.* at 292 (citing *Chambers*, 501 U.S. at 50). Because the "plaintiff's counsel disclaimed any monetary sanction for the offense . . . the usual rules were not 'up to the task'" and reliance on the inherent power was therefore permissible. *Id.* at 293 (quoting *Chambers*, 501 U.S. at 50).

Similarly, in *In re Thalheim*, 853 F.2d 383 (5th Cir. 1988), the court reversed a district court that had relied on its inherent power to suspend an attorney from practice. Noting that the district court had "failed to follow its own rules" when it bypassed a local rule that, like the Montana rule in this case, provided for the appointment of an investigator and independent prosecutor, the Fifth Circuit held that "a district court's inherent power to discipline attorneys who practice before it does not absolve the court from the obligation to follow its own rules which it has created in order to implement its exercise of such power." *Id.* at 388-89.

C. This Court Should Hold That The Inherent Power Can Be Invoked Only If The Sanctioning Provisions In Rules And Statutes Are Inadequate.

This Court should grant review, and hold that the Ninth Circuit erred when it approved the district court's rejection of a fully applicable and on-point Local Rule in favor of its inherent power.

This approach is faithful to this Court's repeated warnings that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). *Accord Chambers*, 501 U.S. at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion."); *Degen*, 517 U.S. at 824

("Principles of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it.") (citation omitted). Moreover, requiring courts to follow statutes and rules where possible helps promote fairness and predictability in an area of law that is uniquely subject to abuse, by ensuring clear notice of the conduct that will subject individuals to punishment and the severity of the sanction that may be imposed. *See BMW v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

In *Chambers* itself, four members of this Court expressed concern over removing restraints on the inherent power to sanction. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Souter, stated that "the proper exercise of inherent powers requires exhaustion of express sanctioning provisions." 501 U.S. at 61 (Kennedy, J., dissenting). Thus, "a district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text-based authority applies." *Id.* at 64. Similarly, Justice Scalia stated that "[j]ust as Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired, so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings." 501 U.S. at 59-60 (Scalia, J., dissenting) (citing *Myers v. United States*, 272 U.S. 52, 128 (1926)). Consequently, "a court must use the prescribed means unless for some reason they are inadequate." *Id.* at 60.

This Court has recognized in other contexts that rules and statutes limit the exercise of a court's inherent authority. *See, e.g., Carlisle v. United States*, 517 U.S. 416 (1996) (federal court cannot evade FED. R. CRIM. P. 29(c) by invoking its inherent supervisory power); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (federal court cannot cir-

cumvent FED. R. CRIM. P. 52(a) by invoking inherent power). The same reasoning applies here, and this Court should grant review, dispel the confusion in the lower courts, and reject the approach followed by the Ninth Circuit.

II. REVIEW IS WARRANTED TO RESOLVE THE QUESTION WHETHER A FREE-STANDING CONTEMPT CITATION FOR A PAST FAILURE TO COMPLY WITH A COURT ORDER IS CIVIL OR CRIMINAL.

1. The Ninth Circuit held that the contempt citation imposed against Mr. Sutter was civil rather than criminal in nature, and thus there was no need to afford him any procedural protections beyond notice and an opportunity to be heard. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988) (criminal contempt citation "may not be imposed on someone who has not been afforded the protections that the Constitution requires of . . . criminal proceedings").

Determining whether a contempt citation is civil or criminal "turns on the 'character and purpose' of the sanction involved." *Int'l Union, UMW v. Bagwell*, 512 U.S. 821, 827 (1994) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Civil contempt sanctions "are considered to be coercive and avoidable through obedience." *Bagwell*, 512 U.S. at 827. A civil contemnor can "end the sentence and discharge himself . . . by doing what he had previously refused to do," and thus "carries the keys of his prison in his own pocket." *Gompers*, 221 U.S. at 442 (quotation omitted).

A contempt sanction is criminal, on the other hand, when it is "punitive" and imposed "to vindicate the authority of the court" rather than coerce future compliance. *Id.* at 441. Unlike a civil contemnor, who still has the power to comply with the court's order and purge himself of the contempt, a criminal contemnor has already done "that which he has been commanded not to do." *Id.* at 442. Thus, the criminal contemnor is punished for a "completed act"; he is "furnished no

key, and he cannot shorten the term by promising not to repeat the offense." *Id.* at 442-43.

The contempt citation in this case was based on Mr. Sutter's alleged violation of the order *in limine* concerning alcohol. Pet. App. 47a ("Lawrence Sutter is adjudged to be in contempt of court for violating this Court's in limine order precluding evidence or discussion of Lasar's alcohol use."). The citation was free-standing, in that it was not linked to any particular sanction or punishment, but was intended, along with the harsh language criticizing Mr. Sutter's character, to stigmatize and reprimand him for having been "convicted" of contempt in Montana federal district court.

The Ninth Circuit held that the contempt was civil because it did not "result[ ] in a sentence of imprisonment" and did not result in a fine. Pet. App. 16a. The court rejected "Ford and Sutter's position that these types of sanctions, which do not result in fines or imprisonment, can qualify as criminal sanctions that necessitate full-blown criminal trials." *Id.* Under the Ninth Circuit's analysis, "[s]o long as the court did not impose serious criminal penalties," the contempt citation was civil rather than criminal, and "due process did not require the district court to conduct a full-blown trial." *Id.*

2. The Ninth Circuit's holding directly conflicts with the D.C. Circuit's decision in *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003). In that case, the district court held the Secretary of the Interior and her assistant in "civil" contempt for, *inter alia*, violating a court order. The D.C. Circuit vacated the contempt citations, explaining that "it is clear the proceeding was, and should have been treated as being, for criminal contempt." *Id.* at 1146. The court noted the free-standing nature of the contempt citation—"[o]n its face . . . the Contempt Order appears to find the defendants in contempt, and then to impose no sanction"—but concluded that "the district court did not intend its decision to be without effect," as the "exceedingly strong words it used in finding the defendants in contempt—in particular its statement that [the Secretary] was 'unfit'—suggest the court intended the

adjudication and accompanying opinion to serve as a reprimand." *Id.*

The D.C. Circuit emphasized that "[a]lthough one may be held in civil contempt for refusing to comply with a court order, a sanction for one's past failure to comply with an order is criminal in nature." *Id.* at 1146-47. The court noted that "[t]he district court clearly intended to punish the defendants for 'failing to comply with the Court's Order' ... which is no doubt why its opinion lacks any suggestion that the defendants could yet comply and thereby purge themselves of the contempt." *Id.* at 1147.

3. The Ninth Circuit's decision in this case is in direct conflict with the D.C. Circuit's decision in *Cobell*. Both cases involve instances in which the district court imposed free-standing contempt citations, untethered to any monetary punishment, for alleged violations of a court order. In both cases, the violation occurred in the past: the contempt citation was based on *completed conduct* by the contemnor, and there was no possibility of the contemnor complying and purging the contempt. Both cases also involve attempts to publicly reprimand the contemnor through harsh language intended to convey disapproval and opprobrium. While the Ninth Circuit held that the contempt citation was civil because it did not involve fines or imprisonment, the same was true in the *Cobell* case, where the court explicitly noted that "the Contempt Order appears to find the defendants in contempt, and then to impose no sanction," yet the court nonetheless held the contempt to be criminal in nature. 334 F.3d at 1146.

This Court should grant review and reject the Ninth Circuit's approach. *Bagwell* and *Gompers* make clear that, as the D.C. Circuit held, it is the nature and purpose of the sanction—*i.e.*, whether it is imposed to punish as opposed to coerce—that distinguishes civil from criminal contempt, and not, as the Ninth Circuit held, whether the citation is accompanied by "serious criminal penalties." Pet. App. 16a.

CONCLUSION

This case provides this Court with the opportunity to resolve the circuit split arising from *Chambers v. NASCO*, and to clarify the limits on the inherent power to sanction. This Court should also take this case to resolve the conflict between the decision below and the D.C. Circuit's ruling in *Cobell v. Norton*.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 18, 2005

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Steven Mark LASAR,
Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,,
Defendant-Appellant,

and

LAWRENCE SUTTER, Appellant.

No. 03-35093.

Argued and Submitted May 5, 2004.
Filed March 3, 2005

Theodore J. Boutrous, Jr., Los Angeles, CA, for appellant Lawrence Sutter.

Richard A. Derevan, Irvine, CA, for appellant Ford Motor Co.

Michael D. Weisman, Boston, MA, for the appellee.

Appeal from the United States District Court for the District of Montana; Donald W. Molloy, District Judge, Presiding. D.C. No. CV-99-00177-DWM.

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

PAEZ, Circuit Judge:

While driving a Ford pick-up truck, plaintiff Mark Lasar was involved in a rollover accident. Lasar subsequently brought a products liability damages action against Ford Mo-

tor Company. This appeal arises from sanctions that the district court levied against Ford and its counsel, Lawrence Sutter, for statements that Sutter made during his opening statement to the jury that ultimately resulted in a mistrial.

In imposing sanctions, the district court determined that Sutter violated two pretrial in limine orders prohibiting Ford from introducing evidence that Lasar had been drinking before the accident and had not been wearing his seatbelt at the time of the accident. At the conclusion of a sanctions hearing, the district court ordered Ford and Sutter to pay sanctions to Lasar and to the District Court. The sanctions were intended to reimburse Lasar for unnecessary expenses and attorney's fees, and to reimburse the district court for the costs of empaneling the jury. The court also found Sutter in contempt of court for deliberately violating the pretrial order relating to alcohol use. Finally, the court revoked Sutter's *pro hac vice* status and permanently barred Sutter from appearing *pro hac vice* in the Missoula Division of the United States District Court for the District of Montana.

Ford and Sutter timely appealed the district court's ruling. We address four questions relating to the court's imposition of sanctions. First, did the district court provide adequate due process? Second, did the court comply with the procedural requirements of its local rules? Third, did Sutter violate the pretrial evidentiary rulings and fail to disclose a prior disciplinary matter in his *pro hac vice* application? Finally, were the sanctions, and rulings relating to Sutter's pro hac vice status, an appropriate response to Sutter's misconduct? With one limited exception, we answer each question in the affirmative. We affirm the district court's ruling as to all sanctions except the permanent ban on Sutter's *pro hac vice* appearance before that court, which we reverse.

We also must decide whether the settlement of the dispute between Ford and Lasar while these appeals were pending renders them moot, so that we lack jurisdiction. Al-

though the settlement agreement barred Ford from obtaining reimbursement of the monetary sanctions it paid to Lasar, we conclude that the agreement did not affect Ford's right to seek reimbursement of the sanctions it paid to the district court. Similarly, since Sutter was not a party to the settlement agreement, we conclude that it could not affect his right to appeal the sanctions award, the contempt citation or the *pro hac vice* rulings.[1]

I.

Steven Lasar was severely injured when he was ejected from his Ford Ranger during a rollover accident. Lasar filed a products liability action against Ford alleging that Ford had designed the Ranger's door-latch mechanism defectively. The district court granted *pro hac vice* status to Sutter, an attorney from Ohio, to represent Ford at trial. Local Rule 83.3(e), United States District Court for the District of Montana ("Local Rules"). John Stephenson served as Sutter's local co-counsel.

Before the jury trial began, the magistrate judge issued two in limine rulings. The first prohibited Ford from introducing evidence that Lasar had consumed alcohol on the day of the accident. The second prevented Ford from telling the jury that Lasar was not wearing his seat belt at the time of the accident. Ford challenged these rulings before the district judge, but the district judge overruled both objections.

When the trial began, Sutter made two comments during his opening statement that the district court ultimately deter-

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[1] Although Lasar does not have a personal stake in the outcome of this appeal, he nonetheless filed a brief supporting affirmance of the district court's sanctions order. We appreciate the thorough briefing by all parties.

mined were violations of the pretrial orders. Initially, Sutter told the jury:

> At about 5:00 that morning, Mr. Lasar got out of bed and went hunting for the morning. Some time in the afternoon, he met up with some of his friends and spent the day playing pool, visiting some local establishments. Somewhere around 10:00 that night, he made the decision to drive himself home. He got into his car and he began his way back to his homestead.

Later in his opening statement, Sutter stated:

> Now, inside the vehicle, something else was going on; Lasar was what we call a free-floating body. His body was banting about inside the car as it was rolling over. And because of what happens during the rollover, something all of us learned in high school and most of us tried to forget, centrifugal force. All that is, is something spinning around like a yo-yo on a string; it wants to keep going outward.

Lasar's attorney requested a sidebar at the conclusion of Sutter's opening statement, but the district court did not allow Lasar to present his objection until the end of the day. When the court permitted Lasar's attorney to explain the objection, Lasar's attorney argued that Sutter's reference to Lasar "visiting some local establishments" and to Lasar's "free-floating body" violated the evidentiary rulings. Although Lasar's attorney requested a curative instruction at a later point in the trial, he also noted a dilemma: "how do we correct the problem without drawing attention to it?"

The district court immediately stated that both of Sutter's statements were "absolutely unacceptable violations of

the orders in limine...." The court then informed Lasar's attorney that it would grant a mistrial and award Lasar his costs. Before finally deciding the issue, however, the district court offered Sutter and Stephenson an opportunity to respond. Sutter, in response to the court's concerns, argued that he had utilized great care in preparing his opening statement, that his reference to Lasar playing pool at some local establishments was ambiguous, and that it was impossible to describe the accident without discussing Lasar's free-floating body. Lasar's attorney requested that the district court direct a verdict in Lasar's favor, but the district court rejected this option, stating "Ford has a legitimate defense."

The next morning, Lasar moved for a mistrial. After hearing additional oral argument about Sutter's opening statement, the district court stated that it was "inconceivable" that Sutter could argue "with a straight face" that he had not violated the order regarding alcohol. The court determined that a curative instruction would not "overcome the prejudice" of Sutter's opening statement. Accordingly, the court granted Lasar's motion for a mistrial and discharged the jury.

The court also notified the parties that it was prepared to impose monetary sanctions based on "an intentional effort, reckless and in bad faith ... to ignore the court's orders...." The court ordered Lasar's attorneys to prepare an affidavit detailing Lasar's costs and attorney's fees incurred over the previous two weeks and to serve the affidavit on Ford and Sutter by the end of the day. The court also orally notified the parties that it would issue an order to show cause ("OSC") why Sutter should not be held in contempt and have his pro hac vice status revoked. Later that day, the district court issued an OSC.

Two days later, the court held a sanctions hearing. At the hearing, Stephenson, Sutter's co-counsel, questioned Sutter. During the course of his examination, Stephenson asked

Sutter, "Have you ever been found in contempt?" Sutter replied:

> I was involved in a case approximately two years ago called *[Kaffeman] v. Yellow Freight* with a judge in Cleveland, Ohio by the name of Patricia Cleary who found me in contempt for attempting to place on the record certain objections. After the trial, I filed a motion with the Ohio Supreme Court to have her recused from that litigation. The Ohio Supreme Court reviewed the transcript in total and issued an opinion exonerating me and indicating that I had taken reasonable steps to put things on the record and removing Judge Cleary from further activity in that case.

On cross-examination, Sutter again testified that he "was found in contempt" in the *Kaffeman* case.[2] Lasar's attorney then attempted to introduce an Ohio Supreme Court opinion in that case, which resulted in the disqualification of the trial judge. See In re Disqualification of Cleary, 723 N.E.2d at 1108. Stephenson did not object, stating, "[w]e cited to the Court[;] we have no objection."

The court also questioned Sutter about the court's rulings in the *Kaffeman* case. For the third time, Sutter testified that the judge in the *Kaffeman* case had "held me in contempt." The district court asked Sutter why he had not disclosed the contempt citation in his *pro hac vice* application.

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[2] This case, *Kaffeman v. Maclin*, resulted in two published opinions: *In re Disqualification of Cleary*, 88 Ohio St.3d 1220, 723 N.E.2d 1106 (2000), and *Kaffeman v. Maclin*, 150 Ohio App.3d 403, 781 N.E.2d 1050 (2002), both of which we discuss in greater detail in Section IV.B.

Sutter initially responded that under his reading of the Local Rules, he "thought that the only thing I had to disclose was if I had been sanctioned by a Bar Association or the local investigatory body." The court pointed out that the Local Rules require attorneys applying for pro hac vice admission to disclose if they have "ever been held in contempt, [or] otherwise disciplined by any court for disobedience to its rules or orders ...." Local Rule 83.3(e)(3)(E). Sutter then explained:

> Well, Your Honor, to be perfectly honest with you, I told John Stephenson two days ago that I had never been held in contempt, and I truly believe that to be true. I have [sic] the copy of the ... Patty Cleary [the judge in *Kaffeman*] case faxed to me last night and it says in that opinion that I was held in contempt, and that's the only reason that I said I was held in contempt today. There was no such hearing like this, there was nothing like this that occurred.

At the conclusion of the hearing, the district court informed the parties that it intended to impose monetary sanctions, but would take into account Sutter's testimony and consider whether to hold Sutter in contempt or "deprive him of his right to appear in this court pro hac vice."

Relying mainly on its inherent authority,[3] the district court imposed monetary sanctions, held Sutter in contempt,

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[3] In imposing monetary sanctions, the district court relied on both its inherent authority and Local Rule 83.14(b) and (c). Local Rule 83.14(b) provides that "[a]n attorney may be subject to disciplinary action ... for [a] ... violation of any court order." Local Rule 83.14(c) specifies that "[d]iscipline may consist of one or more of the following: (1) disbarment; (2) suspension; (3) public

[Footnote continued on next page]

and revoked his pro hac vice status. *Lasar v. Ford Motor Co.*, 239 F. Supp. 2d 1022, 1025-26 (D. Mont. 2003). The court imposed monetary sanctions against Ford and Sutter because Sutter "intentionally and in bad faith" violated the in limine orders and monetary sanctions were "necessary to reimburse Lasar and the Court [and] ... to vindicate the Court's authority and to ensure that Ford, through its lawyers, will not disregard or attempt to circumvent court orders in this or any other case." *Id.* at 1027, 1031. The court awarded $61,397.50 to Lasar--assessed jointly and severally against Ford and Sutter--and required Ford to pay $5,496.15 to the Clerk of Court to reimburse the court for the cost of empaneling the jury. *Id.* at 1028. Second, the court found Sutter in contempt because of his violation of the order in limine prohibiting references to Lasar's use of alcohol.[4] Although the district court's order is not precise, the contempt finding provided an alternative basis for the imposition of compensatory monetary sanctions against Sutter. *Id.* at 1031-32. Third, the district court revoked Sutter's pro hac vice status on the basis of Sutter's violation of both pretrial orders, his failure to disclose the contempt citation in the Kaffeman case, and his dishonest testimony at the sanctions hearing. *Id.* at 1034.

[Footnote continued from previous page]
censure; (4) private reprimand; (5) probation with or without conditions; (6) restitution; (7) fines and/or assessment of costs; and (8) referral to appropriate disciplinary authority." The district court did not rely on Local Rule 83.14 when it held Sutter in contempt and revoked his *pro hac vice* status.

[4] The court did not rely on Sutter's violation of the seat-belt related order to support the contempt citation because the court determined that this violation could have been cured by a jury instruction. *Id.* at 1032 n. 10.

Finally, the district court concluded that Sutter would "no longer be allowed to represent Ford in this case or any other case in the Missoula Division of the Montana Federal District Court." *Id.*

The district court later denied Ford and Sutter's motion for reconsideration. In its order, the court clarified that "Sutter's failure to disclose his prior contempt sanction was not *the* reason for holding him in contempt or for revoking his *pro hac vice* status. Rather, it was additional evidence of his dishonesty, and it was considered as a result of his own testimony."

After Ford and Sutter filed their appeals, Ford settled Lasar's damages action and the district court dismissed the case with prejudice. Ford and Sutter then filed a second amended notice of appeal, which encompassed the court's order of dismissal.

II.

Initially, we must consider whether there is still a live case or controversy in light of the settlement agreement and the dismissal order. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969). To determine whether a case is moot, a court must ask whether a change in the circumstances existing at the beginning of the litigation has "forestalled any occasion for meaningful relief" that the court could grant. *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 n. 4 (9th Cir. 2000) (internal citation and quotation marks omitted).

Although the district court's order stated that "[n]othing herein shall affect the appeal by Ford and its counsel," the district court could not create a case or controversy where none existed. In both the district court's order of dismissal and the settlement agreement, Ford agreed, in the event of a

successful appeal, not to seek reimbursement from Lasar or his counsel for the monetary sanctions that it had paid to them. Accordingly, there is no longer a live controversy between Ford and Lasar over the sanctions that Ford paid to Lasar. *See Riverhead Sav. Bank v. Nat'l Mortgage Equity Corp.*, 893 F.2d 1109, 1112 (9th Cir. 1990) (holding that settlement mooted an appeal over fees payable directly to a party rather than to the court). Any claim by Ford to reimbursement of the $61,397.50 is therefore moot. And because Ford paid the entire amount of the sanctions due to Lasar for which Ford and Sutter were jointly and severally liable, Sutter has no stake in an appeal arising out of these sanctions. Thus, we conclude that any challenge raised by Ford or Sutter related to the $61,397.50 in sanctions awarded to Lasar is moot.

Ford retained its right, however, to challenge and seek reimbursement of the $5,496.15 in sanctions that it paid to the clerk of the district court. To the extent that Ford's claim is moot, it is moot only as to the $61,397.50 paid to Lasar; Ford's challenge to the $5,496.15 in compensatory sanctions is still viable. *Id.* ("Because sanctions assessed against counsel or a party and payable to the clerk of court ... are not subject to revocation by the parties, they are reviewable on appeal regardless of whether the parties settle."). Indeed, the district court's dismissal order recognized that "nothing herein shall preclude Ford from attempting to recover the jury costs paid to the Court in the event the Appellate Court determines that the jury cost sanction was improperly imposed by this Court." Ford therefore has a stake in the outcome of our evaluation of the legality of the monetary sanctions that were made payable to the district court. This issue is not moot.

Finally, we note that the settlement of the underlying case in no way moots Sutter's interest in challenging the district court's contempt citation and the court's revocation of

his *pro hac vice* status. Notably, such a "disciplinary action and consequent disqualification may expose [Sutter] to further sanctions by the bar and portends adverse effects upon counsel's careers and public image.... The controversy thus remains live and demands consideration." *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1200 n. 14 (11th Cir. 1985).

Furthermore, because Sutter was not a party to the settlement, that agreement should not foreclose his right to seek appellate review. *See Johnson v. Bd. of County Comm'rs for Fremont*, 85 F.3d 489, 493 (10th Cir. 1996) (holding that a stipulation by the parties "has no effect on the attorneys' right to appeal because they were not parties to the stipulation"). A contrary result would create conflicting incentives for attorneys. As one of our sister circuits has explained, a "refusal to grant jurisdiction over an appeal of sanctions after the underlying suit has been settled thrusts a personal conflict upon the attorney--by settling a case in the client's interest he may have to forfeit a personal right to appeal the sanctions levied against him." *Perkins v. Gen. Motors Corp.*, 965 F.2d 597, 600 (8th Cir. 1992).

In sum, we agree with the prevailing view that "settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation." *Johnson*, 85 F.3d at 492. We proceed to the merits of Ford's and Sutter's appeals.

III.

Ford and Sutter initially argue that the district court violated principles of due process when it imposed monetary sanctions, held Sutter in contempt and revoked Sutter's *pro hac vice* status. Because the decision to impose sanctions under its inherent authority is within the sound discretion of the district court, we will not overturn its decision unless the

court committed an error of law or the court's factual determinations were clearly erroneous. *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197-98 (9th Cir. 1999). Under this standard, we review de novo issues of law, including whether the district court provided adequate process before imposing sanctions. *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 (9th Cir. 1996).

A.

We first consider whether the district court provided Ford and Sutter with adequate procedural due process before imposing sanctions. As this court recently reaffirmed, notice and an opportunity to be heard are indispensable prerequisites for the types of sanctions[5] imposed by the district court. *Cole v. United States Dist. Court*, 366 F.3d 813, 821 (9th Cir. 2004) ("for the court to sanction an attorney, procedural due process requires notice and an opportunity to be heard"); *see also Weissman*, 179 F.3d at 1198. In particular, "[i]t is axiomatic that procedural due process requires notice of the grounds for, and possible types of, sanctions." *Cole*, 366 F.3d at 821. Notice and an opportunity to be heard "are essential in view of the heightened potential for abuse posed by the contempt power[,]" and "[t]he provision of[these procedural protections] accords with our historic notions of ele-

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[5] The due process requirements for contempt citations and monetary sanctions are similar. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137 (9th Cir. 2001) ("Although contempt and sanctions are not identical, the principles the Supreme Court articulated for cases of contempt in *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994), guide our determination of what procedural protections are necessary in imposing sanctions under a court's inherent powers.").

mentary fairness." *Taylor v. Hayes*, 418 U.S. 488, 500, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974). These minimal procedural requirements give an attorney an opportunity to argue that his actions were an acceptable means of representing his client, to present mitigating circumstances, or to apologize to the court for his conduct. *See id.* at 499, 94 S. Ct.. 2697. Thus, Ford and Sutter were entitled to notice and an opportunity to be heard before the district court imposed sanctions.

Ford and Sutter claim a right to more than notice and an opportunity to be heard. They argue that they were entitled to the full panoply of procedural protections that are normally reserved for defendants charged with a criminal offense, such as an independent prosecutor, proof beyond a reasonable doubt, and a jury trial. When monetary sanctions or a contempt citation are criminal in nature, these additional protections may be required. *Bagwell*, 512 U.S. at 826, 114 S. Ct. 2552. In contrast, civil sanctions may be imposed so long as the court provides adequate notice and an opportunity to be heard. *Id.* at 827, 114 S. Ct. 2552.

In the context of a sentence of imprisonment for contemptuous conduct, the Supreme Court has long distinguished criminal contempts from civil contempts by looking to the "character and purpose" of the sentence. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441, 31 S. Ct. 492, 55 L. Ed. 797 (1911). Confinement for contempt is criminal if it is "punitive" and for the purpose of "vindicat[ing] the authority of the court." *Id.* In contrast, contempt is civil if it is "remedial" and "for the benefit of the complainant." *Id.* A civil contemnor "carries the keys of his prison in his own pocket" because civil contempt is "intended to be remedial by coercing the defendant to do what he had refused to do." *Id.* at 442, 31 S. Ct.. 492 (internal quotation marks omitted). By contrast, imprisonment for a definite period of time, regardless of the contemnor's future actions, is criminal because the contemnor is "furnished no

key." *Id.* As the Supreme Court also has explained, "[t]his dichotomy between coercive and punitive imprisonment has been extended to the fine context." *Bagwell*, 512 U.S. at 829, 114 S. Ct.. 2552. Thus, "[w]here a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." *Id.*

Although the monetary sanctions imposed by the district court in this case have some attributes of criminal sanctions, they ultimately qualify as civil sanctions that need be preceded only by adequate notice and an opportunity to be heard. It is true that Ford and Sutter did not hold the keys to their cells, for they had no way of avoiding the monetary sanctions, the contempt finding, or the revocation of Sutter's *pro hac vice* status. The monetary sanctions imposed, however, were compensatory in nature because they were designed to compensate Lasar for unnecessary costs and attorney's fees and to reimburse the district court for the jury costs incurred as a result of the mistrial. It is well-established that compensatory fines are civil sanctions in the context of contempt proceedings. *See Bagwell*, 512 U.S. at 829, 114 S. Ct.. 2552 ("A contempt fine ... is considered civil and remedial if it ... 'compensate[s] the complainant for losses sustained.'" (quoting *United States v. Mine Workers of Am.*, 330 U.S. 258, 303-04, 67 S. Ct.. 677, 91 L. Ed. 884 (1947))). Indeed, a court's decision to assess costs has "never ... been considered [a] criminal" sanction. *Id.* at 833, 114 S. Ct.. 2552.

We recognize that the Supreme Court has tended to classify fines paid to the court as punitive fines, while fines payable to another party are remedial. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S. Ct.. 1423, 99 L. Ed. 2d 721 (1988). We have recognized, however, that while the identity of the party who receives the fine is an important indicator of whether the fine is criminal or civil, this factor is not determinative. *F.J. Hanshaw Enters., Inc.*, 244 F.3d at

1138 n. 7. For example, we have held that a fine payable to an opposing party was punitive because it was not designed "to compensate [the opposing party] for any actual or estimated harm." *Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996).

Although we have never had occasion to consider whether a sanction for bad faith conduct,[6] payable to a district court, that was tailored to reimburse the court for its expenses, can qualify as a compensatory civil sanction, the Seventh Circuit's decision in *United States v. Dowell* is instructive. 257 F.3d 694 (7th Cir. 2001). There, the district court had required a lawyer to pay a fine equal to the cost of empaneling a jury that the court sustained when the lawyer failed to appear in court on the first day of trial. *Id.* at 696-97. The Seventh Circuit held that, although the fine was payable to the district court, the fine was a compensatory civil sanction because "it compensates the court and the government for actual losses sustained as a result of [the lawyer's] refusal to appear at trial. [The lawyer's] recalcitrance imposed real loss; impaneling a jury costs money, and the

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[6] In *Zambrano v. City of Tustin*, we held that a district court could not award sanctions payable to the court "to compensate the judicial branch for being badly used by counsel." 885 F.2d 1473, 1475-76 (9th Cir. 1989) (internal quotation marks omitted). The basis for the court's sanctions order was counsel's negligent failure to obtain admission to the bar of the Central District of California. We specifically did not address the question of whether willful conduct would justify a narrowly tailored sanctions award that was intended to reimburse the court for unnecessary expenses. *Id.* at 1478. Here, the compensatory sanctions ordered payable to the district court were based on Sutter's bad faith violation of the in limine alcohol-related order. Thus, *Zambrano* does not foreclose the result we reach today.

district court tailored its sanction to compensate for these actual costs." *Id.* at 699-700. As the Seventh Circuit explained, the Supreme Court's decision in Hicks involved a contempt for "an individual's failure to pay court-ordered child support payments, and the Court did not contemplate a situation where the court to which the fine was ordered to be paid was in effect the injured complainant." *Id.* at 700.

We agree with the Dowell court's approach. In the instant case, the district court, after finding that Sutter deliberately violated the pretrial in limine orders, carefully limited the sanctions that were payable to the court to an amount "necessary to reimburse ... the Court" for the costs related to empaneling the jury. *Lasar*, 239 F. Supp. 2d at 1031. Accordingly, this monetary sanction levied against Ford was compensatory and civil in nature, and need only be preceded by notice and an opportunity to be heard.

As for the contempt citation and the revocation of Sutter's *pro hac vice* status, neither one resulted in a sentence of imprisonment. Moreover, although the contempt citation provided an alternative basis for the substantial monetary sanctions, those sanctions were compensatory in nature. We can find no precedent that supports Ford and Sutter's position that these types of sanctions, which do not result in fines or imprisonment, can qualify as criminal sanctions that necessitate full-blown criminal trials. *See, e.g.*, *Hicks*, 485 U.S. at 632, 108 S. Ct. 1423 (discussing the necessity of criminal procedural protections when the contempt punishment is either punitive imprisonment or punitive fines). To the contrary, we have held that a district court need only provide notice and an opportunity to be heard before revoking an attorney's *pro hac vice* status, and we have specified that the "opportunity to be heard does not require an oral or evidentiary hearing on the issue." *Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). Indeed, we have held that "[t]he opportunity to brief the issue fully

satisfies due process requirements." *Id.* If due process does not require an evidentiary hearing, it cannot require the greater procedural protections that normally accompany criminal trials.

Our position is consistent with that of the Third Circuit, which has held that "a full scale hearing is not required in every case" in which an attorney's *pro hac vice* status is subject to revocation. *See Johnson v. Trueblood*, 629 F.2d 302, 304 (3d Cir. 1980). Similarly, in finding that the procedures leading up to a criminal "petty contempt" finding failed to satisfy due process requirements, the Supreme Court has instructed that:

> before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available.

Taylor, 418 U.S. at 498-99, 94 S. Ct.. 2697. Here, the district judge witnessed Sutter's opening statement and could refer back to notes of the trial to refresh his memory. Sutter also was afforded an opportunity to explain his conduct before the district court imposed sanctions and ruled on the OSC. So long as the court did not impose serious criminal penalties, due process did not require the district court to conduct a full-blown trial. *See F.J. Hanshaw Enters., Inc.*, 244 F.3d at 1138 (explaining that contempt which occurs in the court's presence can be punished at a later time after providing notice and an opportunity to be heard and that a full criminal

jury trial is only required if serious criminal penalties are imposed).[7] Thus, Ford and Sutter were entitled only to notice and an opportunity to be heard before sanctions were imposed.[8]

B.

The district court provided notice and an opportunity to be heard before imposing any sanctions. At the conclusion of the hearing on Lasar's motion for a mistrial, the court notified the parties that sanctions were warranted. The court specifically directed Lasar to prepare an affidavit detailing his fees and costs over the previous two weeks and to serve the affidavit on Stephenson and Sutter by the end of the day. The court also stated that it was "going to issue a show cause

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[7] We have not established a "precise limit for a 'serious' sanction entitling an individual to a jury trial." *Id.* at 1139 n. 10. We have noted, however, that the Supreme Court has implied that "$5,000, at least in 1989 dollars, is the cutoff for a serious fine warranting a jury trial." *Id.* (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 544, 109 S. Ct.. 1289, 103 L. Ed. 2d 550 (1989)). Although the monetary sanction imposed on Ford exceeded this threshold, it was not a criminal sanction because it was compensatory. As explained in the text, compensatory monetary sanctions, as opposed to criminal fines, need only be preceded by notice and an opportunity to be heard.

[8] Lasar contends that Ford and Sutter should be judicially estopped from arguing that the sanctions were criminal because of representations made by Sutter in subsequent *pro hac vice* applications. We do not address this argument because we conclude that the sanctions were not criminal in nature. And because we have no need to examine the papers presented by Lasar to support his assessment, we deny the request that we strike portions of Lasar's brief and award other forms of relief.

order for Mr. Sutter to show cause why he should not be held in contempt ... [and] why he should not have his right to appear here pro hoc [sic] vice withdrawn from the Court and that he be barred from further participation in this case." Later that day, the district court issued the OSC notifying the parties of the potential monetary sanctions, contempt citation, and revocation of Sutter's pro hac vice status. Thus, Sutter and Ford had notice that these sanctions could be imposed, and the sanctions hearing provided Sutter and Ford with an opportunity to contest the imposition of sanctions.[9]

Ford and Sutter argue that the notice was inadequate because they were not informed that the court was considering sanctioning Sutter for failing to disclose the *Kaffeman* disciplinary matter on his pro hac vice application. Initially, we note that the monetary sanction and the contempt citation were not imposed because of this omission. Even for the revocation of pro hac vice status, the omission was only "additional evidence of [Sutter's] dishonesty."

Second, it was Sutter, not the district court, who raised the *Kaffeman* decision. The first mention of the *Kaffeman* case occurred when Sutter, responding to a question from his co-counsel, stated that he had been held "in contempt" by Judge Cleary in the *Kaffeman* case. As the district court explained, the *Kaffeman* decision "was considered as a result of [Sutter's] own testimony." We decline to fault the district court for carefully considering all of Sutter's testimony and for being familiar with the court's pro hac vice requirements.

We agree, however, with Sutter that the district court's lifetime ban on Sutter appearing *pro hac vice* in the Missoula

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[9] After Ford and Sutter received the OSC, they had two days to prepare for the sanctions hearing. They do not contend that this period of time was insufficient to prepare a meaningful response.

Division on behalf of Ford or any other client without giving adequate notice and an opportunity to respond was an abuse of discretion. The district court never notified the parties that it was considering a lifetime ban on Sutter appearing pro hac vice in the Missoula Division.[10] Due process required the district court to notify the parties of the types of sanctions that it was contemplating. *See Cole*, 366 F.3d at 821. Accordingly, we reverse the district court's imposition of a lifetime *pro hac vice* ban on Sutter because it violated Sutter's due process right to notice.

IV.

Ford and Sutter also contend that in revoking Sutter's *pro hac vice* status, the district court did not comply with the procedures for disciplining attorneys established by the Local Rules. *See* Local Rule 8.14. According to Ford and Sutter, the court could not discipline Sutter for omitting information from his *pro hac vice* application without first referring the matter to the Chief Judge of the District to appoint an investigator and independent counsel to prosecute the alleged violation. And revocation could be ordered only upon clear and

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[10] Because, by definition, *pro hac vice* status is granted on a case-by-case basis, a lifetime ban makes little sense. That is, every time an application is submitted for approval, the court will have the opportunity to review the applicant's suitability to appear *pro hac vice*. We also note an ambiguity in the district court's order prohibiting Sutter from "represent[ing] Ford in this case or any other case in the Missoula Division...." *Lasar*, 239 F. Supp. 2d at 1034. It is unclear whether "represent Ford" modifies "any other case," as well as "in this case," or whether "any other case" includes cases in which Sutter represents a client other than Ford. Because we vacate the lifetime ban, we need not address this issue.

convincing evidence that Lasar wilfully violated the disclosure requirements.

Ford and Sutter, however, ignore two important provisos in the Local Rules. First, Local Rule 83.14(a) provides that "[n]othing contained in this Rule shall be construed to limit or deny the Court such powers as are necessary to maintain control over proceedings before it, such as contempt power." Second, this rule clarifies that "[n]othing in this section precludes the Court or any judge of the Court from assessing sanctions for violations of local practice and procedure rules or other applicable statutes and rules." Local Rule 83.14(b). Thus, Rule 83.14 preserves the presiding judge's inherent authority to impose sanctions and to hold an attorney in contempt, while providing a procedure for referring disciplinary matters to the Chief Judge if the presiding judge decides such a procedure is appropriate. This comports with the Supreme Court's position that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49, 111 S. Ct.. 2123, 115 L. Ed. 2d 27 (1991). Accordingly, the district court did not violate the Local Rules when it revoked Sutter's *pro hac vice* status without referring the matter to the Chief Judge.[11]

V.

We next consider whether the district court improperly determined that Sutter violated the orders in limine or that Sutter failed to disclose a prior contempt citation.

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[11] In fact, the judge presiding over this case is the Chief Judge of the District of Montana. It is clear from the circumstances, however, that Judge Malloy was acting in his capacity as the judge presiding over the Lasar matter and not in his capacity as the Chief Judge of the district in the sanctions proceeding.

A.

Ford and Sutter argue that the district court erred when it held that Sutter had, during his opening statement, violated the in limine order prohibiting references to alcohol use by Lasar. We disagree.

Sutter, by his own admission, carefully chose to tell the jury that the accident occurred after Lasar "met up with some of his friends and spent the day playing pool, visiting some local establishments" and then "made the decision to drive himself home." As the district court emphasized, "[w]hat this record does not show is the tone and inflection of Mr. Sutter's voice." Even the record, however, suggests a calculated attempt to introduce evidence that Lasar was drinking before the accident. We cannot say that the district judge clearly erred in finding that Sutter's words conveyed the unambiguous message that Lasar had been drinking at a bar (or bars) and then made the dangerous and unlawful decision to drive himself home while intoxicated. Thus, we cannot conclude that the district court abused its discretion when it determined that Sutter violated the order in limine. *See United States v. Avery*, 295 F.3d 1158, 1181 (10th Cir. 2002) (stating that a district court's ruling on whether an attorney violated an order in limine is reviewed for abuse of discretion).[12]

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[12] Although we have held that a district court's decision whether to issue an in limine order is an evidentiary ruling that we review for abuse of discretion, *United States v. Komisaruk*, 885 F.2d 490, 492 (9th Cir. 1989), we have never considered what standard of review to apply to a district court's determination of whether a party or an attorney has violated an in limine order. We agree with the Tenth Circuit's holding in Avery that whether a party has violated an in limine order is also an evidentiary ruling that should be reviewed for abuse of discretion. 295 F.3d at 1181.

Moreover, in light of Sutter's own statements about the deliberateness with which he crafted his opening statement, the district court did not commit clear error in holding that this was a deliberate bad faith violation.[13] *See Pac. Harbor Capital, Inc.*, 210 F.3d at 1117 ("We will reverse a district court's factual findings as to whether an attorney acted recklessly or in bad faith only if they are clearly erroneous.").

B.

Ford and Sutter also contend that the district court erred to the extent it relied on the omission of the *Kaffeman* disciplinary matter from Sutter's pro hac vice application to justify the imposition of sanctions. The Local Rules required

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[13] Ford's counsel at oral argument challenged the district court's decision to grant a mistrial. As we understand its position, Ford challenges the mistrial ruling only insofar as it resulted in the imposition of monetary sanctions on Ford. Assuming that this issue was properly raised in its opening brief, we nevertheless conclude that the district court did not abuse its discretion in granting Lasar's request for a mistrial. *See United States v. Vincent*, 758 F.2d 379, 380 (9th Cir. 1985) ("A district court's decision on a motion for mistrial is reviewed for abuse of discretion."). A mistrial was appropriate because the in limine order prohibiting references to Lasar's use of alcohol was "specific in its prohibition and the violation [was] clear...." Furthermore, the violation resulted in prejudice to Lasar. *See Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001). The district court considered the less drastic alternative of a curative instruction, but concluded that this alternative would have brought only more attention to the matter. *See Zambrano*, 885 F.2d at 1475 n. 4 (warning that a district court should consider alternatives to declaring a mistrial); *see also Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975) ("curative instructions must not emphasize the error").

Sutter to disclose in his *pro hac vice* application whether he had "ever been held in contempt, [or] otherwise disciplined by any court for disobedience to its rules or orders...." Local Rule 83.3(e)(3)(E). In the *Kaffeman* case, the presiding judge, Judge Patricia A. Cleary, twice incarcerated Sutter for purportedly violating her orders. In re Disqualification of *Cleary*, 723 N.E.2d at 1107. Judge Cleary, however, never journalized the entry of a contempt order, and under Ohio law, an order is not binding and cannot be appealed unless it is journalized. *State ex rel. Grove v. Nadel*, 81 Ohio St. 3d 325, 691 N.E.2d 275, 277 (1998); Reese v. Proppe, 3 Ohio App. 3d 103, 443 N.E.2d 992, 998 (1981).

The significance of Judge Cleary's confinement of Sutter is also complicated by the Ohio Supreme Court's disqualification of Judge Cleary from the *Kaffeman* case and the Ohio Court of Appeals' decision granting Sutter's client a new trial. When the Ohio Supreme Court ruled on Sutter's motion to disqualify Judge Cleary, it stated that:

> Judge Cleary's courtroom demeanor and conduct toward affiants impl[y] a hostile feeling or spirit of ill will such that requires her disqualification.... The brief portion of the record cited above shows Judge Cleary referring to attorney Sutter's incarceration as a "time out," denying affiants' seemingly reasonable requests to record objections ..., and subjectively characterizing testimony.... These actions cause me to conclude that Judge Cleary has demonstrated a fixed anticipatory judgment that requires her disqualification to avoid the appearance of impropriety and restore the absolute confidence of the parties in the fairness of these proceedings.

In re Disqualification of Cleary, 723 N.E.2d at 1107 (alteration in original) (internal citations and quotation marks omit-

ted). The Ohio Supreme Court's reference to Sutter's "seemingly reasonable requests to record objections" implies disapproval of Judge Cleary's confinement of Sutter. The Ohio Supreme Court, however, did not explicitly overturn Judge Cleary's discipline of Sutter.

The Ohio Court of Appeals also determined that:

> The record in this case is replete with evidence of the lower court's bias against the defendants in this matter, which clearly prevented a fair and impartial proceeding.... Thus, the validity of the entire trial, including the decisions made by the trial court on evidentiary issues, has been drawn into question. Because it is impossible to assess the prejudicial effect of the trial judge's conduct on the proceedings, there is simply no way that any review of this matter can render satisfaction that justice was done. Accordingly, we conclude that the lower court abused its discretion in denying the appellants a new trial.

Kaffeman, 781 N.E.2d at 1053. Again, there is no express statement overruling Judge Cleary's confinement of Sutter, but the court of appeals did find that the "entire trial ... ha[d] been drawn into question" by Judge Cleary's bias. In light of Judge Cleary's failure to journalize her disciplinary actions, and the reviewing court's implicit disapproval of Judge Cleary's treatment of Sutter, it is doubtful that Judge Cleary properly found Sutter in contempt of court.

These facts, however, must be considered in the context of Sutter's repeated representations that he had in fact been held in contempt. Sutter "assert[ed] [to the Ohio Supreme Court] that the judge twice found affiant Sutter in contempt." *In re Disqualification of Cleary*, 723 N.E.2d at 1107. Sutter also testified before the district court on both direct and cross-examination that he had been held in contempt of court.

Sutter only began to question the nature and significance of Judge Cleary's disciplinary action after the district court brought the alleged omission from the pro hac vice application to Sutter's attention. At that point, Sutter explained, "I have [sic] the copy of the ... Patty Cleary case faxed to me last night and it says in that opinion that I was held in contempt, and that's the only reason that I said I was held in contempt today.... There was no finding of contempt."

Ultimately, the question is whether Sutter failed to disclose that he had "ever been held in contempt, [or] otherwise disciplined by any court for disobedience to its rules or orders ...." Local Rule 83.3(e)(3)(E). In light of these events, Sutter could reasonably have believed that he had never been held in contempt because Judge Cleary never journalized a formal contempt citation.[14] Whether he in fact believed this to be the case is questionable given his representations to the Ohio Supreme Court and the district court that he had been held in contempt.

But Sutter and Ford seem to ignore that the Local Rules required Sutter to disclose whether he had "otherwise [been] disciplined by any court for disobedience to its rules or orders." Local Rule 83.3(e)(3)(E). We fail to understand how any reasonable attorney could not view being incarcerated by a judge as a disciplinary action. Nor did the subsequent hold-

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[14] We decline Ford and Sutter's request to take judicial notice of a Journal Entry by the Court of Common Pleas of Cuyahoga County, Ohio because they are offering the factual findings contained in the order for the purpose of proving the truth of the factual findings contained therein. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 n. 5 (9th Cir. 2003) ("Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice.").

ings of the Ohio Supreme Court and the Ohio Court of Appeals relieve Sutter of the duty to disclose this matter to the district court. The Local Rule asks if the attorney has "ever been" disciplined, and does not provide an exception for disciplinary orders that are overturned.

This approach does not render the Local Rule vague or strike us as unfair. Any "person of ordinary intelligence [would have] a reasonable opportunity to know" that disclosure would be required in these circumstances. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct.. 2294, 33 L. Ed. 2d 222 (1972); *see also Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct.. 2547, 41 L. Ed. 2d 439 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). We fail to see any ambiguity in the Local Rule: any disciplinary matter must be disclosed, and there is no exception for disciplinary orders that have been called into question by an appellate court. Any potential unfairness that could result from having to report such incidents is easily cured by the attorney's ability to explain the circumstances in his *pro hac vice* application. Thus, we conclude that the district court did not abuse its discretion in relying on this omission from Sutter's *pro hac vice* application as added support for the imposition of sanctions.

Additionally, we would not reverse the district court's imposition of monetary sanctions and the contempt finding in this case even if Sutter had not violated the *pro hac vice* admission requirements. The monetary sanctions and the contempt citation were based solely on Sutter's violation of the in limine order. Although the revocation of Sutter's *pro hac vice* status was based in part on Sutter's failure to disclose the *Kaffeman* matter in his application, the district court stated that this only provided additional evidence of Sutter's dishonesty. We conclude that Sutter's violation of the order in limine relating to alcohol could, standing alone, support

the district court's decision to revoke Sutter's *pro hac vice* admission.

VI.

Finally, Ford and Sutter argue that the sanctions were overly harsh. In light of the hardship that Sutter's bad-faith violation of the order in limine caused to Lasar, the court, and other litigants, we disagree.

When a district court sanctions an attorney or a party based on its inherent powers, "[a] primary aspect of [its] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45, 111 S. Ct.. 2123. The district court's decision to require Ford to pay compensatory sanctions to the court was well within the court's discretion, particularly because the payments were carefully tailored to reimburse the court for those costs that were incurred as a result of the mistrial.

The contempt citation also was within the court's discretion, for "[t]he power to punish for contempts is inherent in all courts." *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510, 22 L.Ed. 205 (1873). Finally, the district court's revocation of Sutter's *pro hac vice* status falls within "the scope of the inherent power of the federal courts" because "a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." *Chambers*, 501 U.S. at 43, 111 S. Ct.. 2123. Accordingly, the district court did not abuse its discretion in crafting these sanctions.

VII.

In sum, we affirm the district court's formal sanctions order including the imposition of monetary sanctions, the contempt finding, and the revocation of Sutter's *pro hac vice* admission. However, we reverse the district court's lifetime ban on Sutter appearing *pro hac vice* in the Missoula Division.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

United States District Court
D. Montana
Missoula Division

Steven Mark LASAR,
Plaintiff

v.

FORD MOTOR COMPANY,
Defendant.

No. CV 99-177-M-WNM

Jan. 2, 2003.

Michael D. Weisman, Weisman & Associates, Boston, MA, Paul C. Meismer, Caarey Meismer, Missoula, MT, Patrick M. Ardis, Wolff Ardis, Memphis, TN, for Plaintiff.

John D. Stephenson, Jardine, Stephenson, Blewett & Weaver, Great Falls, MT, Lawrence A. Sutter, Sutter, O'Connell, Mannion & Farchione, Cleveland, OH, for Defendant.

ORDER

MOLLOY, Chief Judge.

I. Factual Background

This case arises out of an accident on February 17, 1997 in which Plaintiff Steven Lasar was injured when the 1986 Ford Ranger pickup he was driving rolled several times. Lasar was ejected from the vehicle, suffering severe injuries. He filed suit against Ford Motor Company alleging, in part, that the door latch mechanism on the Ranger was defective,

allowing the door to open during the accident and leading to his ejection from the vehicle.[1]

The case was referred to United States Magistrate Leif B. Erickson for all pretrial proceedings. In response to motions in limine, Judge Erickson ruled that under Montana law, evidence of Lasar's failure to wear a seatbelt was inadmissible at trial.[2] Judge Erickson also ruled that any evidence of alcohol use by Lasar on the day of the accident would be excluded at trial. On the alcohol issue, Judge Erickson found, and Ford has conceded, that there is no evidence to establish a causal link between Lasar's modest consumption of alcohol and the accident.[3] Ford objected to Judge Erickson's rulings, even though Montana law is clear on seatbelt evidence and even though Ford had no relevant proof to support its prejudicial argument that drinking was

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[1] Lasar brought several claims, however, all but his strict liability claim were dismissed upon his own motion.

[2] Mont.Code Ann. § 61-13-1-6 states

> [e]vidence of compliance or failure to comply with 61-13-103 is not admissible in any civil action for personal injury or property damage resulting from the use or operation of a motor vehicle, and failure to comply with 61-13-103 does not constitute negligence.

[3] The only evidence of alcohol use was Lasar's statement in a deposition that he drank a few beers over the course of the day. Tests taken after the accident indicated that Lasar had a blood alcohol concentration well below the level at which a driver in Montana is considered to be impaired. Additionally, testimony of his friends, and testimony from a highway patrol officer that stopped him shortly before the accident indicate that Lasar was not intoxicated.

involved in the wreck. After further briefing, I overruled both objections and affirmed by written order there would be no evidence or inference at trial about seatbelts or alcohol.

The case was originally set for trial on February 4, 2002. At that time, Ford was represented by John Stephenson and John Randolph Bibb, the latter having been admitted *pro hac vice*. Due to other cases on the docket, the February trial date was continued until May 6, 2002. On April 24, 2002, Ford moved to allow Bibb to withdraw and to substitute Lawrence Sutter as counsel.[4] I allowed Bibb to withdraw and, based on the representations in his affidavit, granted Sutter's admission pro hac vice. As it turns out, that affidavit was misleading and failed to inform the Court of Sutter's prior contempt in an Ohio state court. (*See* Ohio Aff. of Lawrence A. Sutter, attached as Appendix A.)[5]

In late April 2002, it became apparent that a number of criminal matters would be going to trial at the same time that this case had been set. The Court was again compelled to continue Lasar's case. Trial was rescheduled for October 7,

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[4] Though the motion to withdraw and substitute was filed in April 2002, Sutter's affidavit in support of his admission pro hac vice was filed May 7, 2002.

[5] Sutter filed this affidavit with the Ohio court in December of 1999. It is highly improbable that he forgot about having been jailed twice for contempt in the time between December 6, 1999 and May 7, 2002 when he filed his pro hac vice request in this Court. Further, Sutter's pro hac vice affidavit did not state that he had not been held in contempt, but omitted any reference to contempt, though it included all other information required by local rule. *Compare* L.R. 83.3(e)(3), attached as Appendix B, *with* Pro Hac Vice Aff. of Lawrence A. Sutter, attached as Appendix C.

2002. Before trial, I issued my orders overruling Ford's objections to Judge Erickson's rulings.

At trial, during the Court's voir dire, I made it clear to the jury panel that, if selected as jurors, they could not consider Lasar's use or non-use of seatbelts in rendering a verdict. All jurors agreed that they would follow this direction. The issue and the law had been explained to them and I was satisfied the case could be tried within the constraints of Montana law. The issue of alcohol was not discussed at anytime in voir dire or in Plaintiff's opening statement. It was not an issue, or so I thought.

During Defendant's opening statement, Sutter decidedly made the following prejudicial assertions:

> Let me give you a few more details.
>
> At about 5:00 that morning, Mr. Lasar got out of bed and went hunting for the morning. Some time in the afternoon, he met up with some of his friends and spent the day playing pool, visiting some local establishments. Somewhere around 10:00 that night, he made the decision to drive himself home. He got into his car and he began his way back to his homestead.
>
> ...
>
> Now, inside the vehicle, something else was going on; Lasar was what we call a free-floating body. His body was banting (sic) about inside the car as it was rolling over. And because of what happens during the roll-over, something all of us learned in high school and most of us tried to forget, centrifugal force. All that is, is something spinning around like a yo-yo on a string; it wants to keep going outward.

Partial Tr. of Sutter's Opening Statement, Docs. 170, 171 (emphasis added).[6]

Immediately following Sutter's opening statement, counsel for Lasar requested a side bar. I denied the request and told counsel that any issues would be dealt with at a later time. Furthermore, the order in limine protected Lasar's record on the violation of the Court's orders. When given an opportunity, counsel for Lasar strenuously objected to Sutter's opening to the extent it implied that Lasar was intoxicated or that he was not wearing a seatbelt at the time of the roll-over. While Lasar initially asked for a curative instruction, it was clear that Sutter's deliberate violation of the Court's orders in limine would prevent a fair trial.

I ultimately granted a motion by Lasar for a mistrial. Given the egregiousness of the violation, I determined an award of sanctions would be appropriate. Ford and Sutter were given notice of my intentions and the remedies and sanctions being considered. On October 10, 2002, a hearing was held at which I addressed three issues: (1) the amount and nature of sanctions to be imposed; (2) whether Sutter could show cause why he should not be held in contempt; and (3) whether Sutter should have his admission to practice pro hac vice revoked.

After considering the evidence presented at the show cause and contempt hearing, I have concluded that Lawrence Sutter and Ford should be sanctioned for Sutter's deliberate violation of the orders in limine. I have concluded that Sutter is in contempt of court for violating the order prohibiting him

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[6] As I noted at the time I ruled on the mistrial, the cold record cannot capture the tone, the inflection, and the deliberate message Sutter intended, and communicated in his irrelevant and prejudicial statements.

from suggesting alcohol was an issue when he knew there was no proof to support the prejudicial inference and suggestion, and when he knew the proof from the Highway Patrol, friends, and medical evidence was contrary to what he implied to the jury. Finally, I find that Lawrence Sutter deliberately misled the Court in his application to appear in this case pro hac vice. His deceit was compounded by further misleading statements about his prior contempt in Ohio and his relativist ethics in trying to rationalize his admitted efforts to stay within his perception of the letter of a court order, while blatantly violating the intent and spirit of the order. In short, Lawrence Sutter lacks the candor and integrity to appear in this Court pro hac vice. There is no room in this Court for lawyers who do not abide by the rules of court and the orders entered in a case. My reasoning is set forth below.

II. Authority for Contempt and Sanctions

The Court's power to impose sanctions on Ford Motor, Sutter or both derives from three places: (1) the Court's inherent authority; (2) 28 U.S.C. § 1927; and (3) Local Rule 83.14(b) & (c). The Court's inherent authority also allows it to hold Sutter in contempt for violating a specific court order. It is within my discretion to determine upon which ground I will rely when imposing sanctions. *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). In this case, I rely upon my inherent power in resolving the issues before me.

A. 28 U.S.C. § 1927

Section 1927 allows counsel to be held liable for conduct that "multiplies the proceedings in any case unreasonably and vexatiously." In such a case, the Court may order counsel to pay "excess costs, expenses, and attorneys' fees reasonably incurred" because of the conduct. Liability under this statute is limited to counsel and cannot be imposed on the party. Additionally, the range of sanctions is limited to excess costs and fees and is not as broad as the sanctions allowed under

the Court's inherent authority. I am not relying on this statute in the orders I am entering in this case.

B. Inherent Authority

Under its inherent authority, the Court, acting on motion or sua sponte, has the power to sanction bad faith conduct, even where that conduct is sanctionable under other rules or statutes. *In re Itel Securities*, 791 F.2d 672 (9th Cir. 1986). To impose sanctions, the Court must make a finding in the record that Sutter acted in bad faith or that his conduct was "tantamount to bad faith." *Fink*, 239 F.3d at 994. While recklessness alone is not enough to impose sanctions under the Court's inherent authority, recklessness coupled with an improper purpose justifies sanctions. *Id.* (holding that reckless misstatements of law or fact made in an attempt to influence or manipulate proceedings to gain a tactical advantage are sanctionable). *See also, id.* at 992 (relying on Itel and noting that "sanctions are justified when a party acts *for an improper purpose*--even if the act consists of making a truthful statement or non-frivolous argument or objection" (emphasis in original)).

Under its inherent authority, the Court has broad discretion in the types of sanctions imposed, including attorney's fees and costs, disciplining the attorney, giving a warning of default or dismissal, and/or a fine payable to the Court. The purpose of a fee award is to compensate the innocent party, vindicate an affront to the Court, and to ensure abuses are not repeated. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56-57, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). The award of fees is not limited to excess fees, as in § 1927; however, any sanction imposed must relate to and be appropriate to the bad faith conduct involved. Additionally, unlike sanctions under § 1927, sanctions under the Court's inherent authority can be imposed against the attorney, the client or both. *See Cannon v. Loyola University of Chicago*, 784 F.2d 777, 782 (7th Cir. 1986); Rutter Group Practice Guide, Federal Civil Procedure

Before Trial, 17:5(a), 17:133. Again, I am relying on my inherent authority in entering the orders in this case that follow.

C. Local Rules

Local Rule 83.14(b) & (c) allows the Court to sanction an attorney for violating any court order. Possible sanctions include suspension, restitution, and fines or assessment of costs.

D. Civil Contempt

The Court's inherent authority includes the power to hold a party or an attorney in contempt of court. The contempt power includes the power to impose sanctions, and is intertwined with the powers discussed above.

Civil contempt occurs when there is a clear and definite order, the contemnor knows of the order, and he or she violates the order. *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980). Unlike criminal contempt, civil contempt does not require a willful violation and good faith is not a defense. *Id.* Attorneys are bound to obey court orders, even when they believe the orders are clearly erroneous. *Chapman v. Pacific Telephone and Telegraph Co.*, 613 F.2d 193. 197 (9th Cir. 1979).

A sanction for contempt is civil if the purpose of the sanction is to coerce compliance or to compensate an innocent party for the contemnor's violation. *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1137-38 (9th Cir. 2001). The order imposing civil contempt must contain clear justification for the purpose and amount of any sanctions imposed. *O'Connor v. Midwest Pipe*, 972 F.2d 1204, 1211 (10th Cir. 1992). Additionally, the record must reflect consideration of the following factors:

(1) harm from noncompliance;

(2) probable effectiveness of the sanction;

(3) contemnor's financial resources and burden sanctions may impose; and

(4) contemnor's willfulness in disregarding the court's order.

United States v. United Mine Workers of America, 330 U.S. 258, 303-304, 67 S. Ct. 677, 91 L. Ed. 884 (1947).

III. ANALYSIS

A. Sanctions

In this case, an award of sanctions under my inherent authority and L.R. 83.14(b) & (c) is appropriate. Sutter's conduct has resulted in unnecessary multiplication of proceedings and undue expense to Lasar, his counsel, and the Court. In listening to Sutter's opening statement, it is obvious that it was well-planned and that he chose his words carefully. I believe his deliberate effort to circumvent the two orders in limine was done intentionally and in bad faith. Sutter, without using notes or other cues, referred to trial exhibits as they appeared on the courtroom screens, though he could not see the screens. His presentation was polished and careful; his tone, his pacing, his inflection, and his body language were all observed by the jury and the Court and were obviously intended to leave the jury with the following message: Lasar spent the day drinking, decided to drive himself home, did not wear his seatbelt, then rolled his truck and is now claiming it is Ford's fault! Based on this, the only conclusion I can reach is that Sutter intended to poison the jury by intimating that Lasar was drunk at the time of the accident and that he was not wearing a seatbelt. This was a willful and bad faith violation of both the orders in limine of Judge Erickson and of this Court.

In preparing this case for trial on October 7, 2002, Lasar incurred many expenses. The two weeks leading to trial are critical in the time, effort, and expense necessary to prepare. Many costs, including some expert fees, attorneys' fees,

travel expenses, and other expenses will be repeated by virtue of Sutter's unprofessional conduct at trial.

Counsel for Lasar, at the Court's direction, submitted affidavits and documentation seeking a total of $193,966.53 in costs as sanctions against Ford and Lawrence Sutter. Both Ford and Sutter had this information before the October 10, 2002 hearing. Based upon the affidavits filed by Lasar, and Ford's counter-arguments, I have determined that Lasar is entitled to an award of sanctions totaling $61,397.50. This amount is assessed jointly and severally against Ford and Lawrence Sutter.[7] Ford shall pay an additional $5,496.15 to the Clerk of Court for the cost of empaneling the jury. A breakdown of the sanctions is set forth below.

1. Attorneys' Fees

Lasar asks for attorneys' fees totaling $99,478.43. The submission includes time for five attorneys and six paralegals with attorney time calculated at $250.00 per hour. While Lasar should be awarded fees for the time attorneys Michael Weisman, Paul Meismer, and Pat Ardis spent preparing during the two weeks before trial, no fees are awarded for paralegal or associate time. Weisman, Meismer, and Ardis were lead counsel and they will need to expend a similar amount of time preparing for a later trial. The two associates and six paralegals were not lead counsel and, had they not been working on this matter, they would have been paid for other work. I am mindful that Lasar has employed the lawyers through a contingent fee.

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[7] No sanction is imposed on John Stephenson, Ford's Montana counsel. Nothing in this Order is intended to reflect on the character or professionalism of Mr. Stephenson.

Lasar bases his fee calculation on a rate of $250 per hour for attorney time. His lawyer has candidly stated that the case is not so complex as to require specialized skill or knowledge. Counsel for Ford indicates that his normal hourly rate is $140.00 per hour, while Meismer indicates that he normally charges $150.00 per hour when performing mediation. Lasar's $250.00 per hour calculation is based in part on the risk associated with taking a contingency fee case. However, the award of fees as sanctions is guaranteed; because the matter is not unusually complex, the lower $150.00 per hour rate is reasonable. Thus, Lasar will be awarded attorneys' fees calculated at $150.00 per hour for the time of Weisman (118.8 hours), Meismer (87.0 hours), and Ardis (57.15 hours). Total attorneys' fees in the amount of $39,442.50 are assessed.

2. Costs for Dr. Rudy Limpert, Dr. Martha Bidez and Andrew Gilberg

Lasar seeks reimbursement of expenses totaling $7,271.00 for Dr. Limpert, $18,026.00 for Dr. Bidez, and $12,055.50 for Andrew Gilberg. Each is an expert witness retained by Lasar and each traveled to Missoula in anticipation of testifying at trial. The invoice submitted on behalf of Dr. Limpert indicates expenses of $971.00 and fees of $6,300.00. Dr. Limpert was the only expert to testify before I declared a mistrial. His invoice includes 1 1/4 days of preparation and one day of testimony, which includes travel time. Ford objects to an award of fees for the preparation time. However, this is time Dr. Limpert will again expend in preparing for the next trial. Therefore, the full $6,300.00 in fees is reasonable. Because Ford does not object to the expenses incurred by Dr. Limpert, Lasar is entitled to an award of $7,271.00 for the fees and expenses of Dr. Limpert.

Dr. Martha Bidez also traveled to Missoula, however, she did not testify. Lasar seeks a total of $18,026.00 for Dr. Bidez' services, including $16,000.00 in fees and $2,026.00

in expenses. Ford argues that this amount is unreasonable, as it amounts to five twelve hour days at her stated rate of $250.00 per hour.

The Court agrees with Ford on this issue. Dr. Bidez did not testify, but she was required to travel to Missoula and sit outside the courtroom on the first day of trial. A reasonable expense for purpose of sanctions is eight hours at $250.00 per hour, plus her expenses of $2,026.00, for a total of $4,026.00.

Likewise, Andrew Gilberg traveled to Missoula but did not testify. Lasar seeks a total of $12,055.50 on his behalf, including $9,377.50 in fees and $2,678.00 in expenses. Like Dr. Bidez, a reasonable expense for purpose of sanctions is eight hours at Gilberg's stated rate of $275.00 per hour, plus the $2,678.00 in expenses, for a total of $4,878.00.

3. Treating physicians

Lasar asks for reimbursement of fees for the services of Dr. Mark Dietz and Dr. Karen Weed, both of whom are treating physicians. Both were expected to testify, though neither one traveled to Missoula. Lasar submitted a bill on behalf of Dr. Weed indicating a charge of $225.00 for trial preparation. Lasar did not submit a bill on behalf of Dr. Dietz, but Weisman indicated in an affidavit that the services of Dr. Dietz would cost $1,125.00.

Both treating physicians will need to review their records prior to the next trial. The amount requested on behalf of Dr. Weed is reasonable, as it is likely she will incur a similar amount in later preparation for trial testimony. The amount requested for Dr. Dietz is based on counsel's knowledge of the work he did in preparing for the trial. In light of the statement submitted on behalf of Dr. Dietz, the Court finds that a reasonable amount for the treating physicians' cumulative preparation time is $1,350.00.

4. Costs for Anne Arrington and Dr. Ronald Dulaney

Ms. Arrington and Dr. Dulaney are experts retained by Lasar who did not testify and did not incur travel expenses. Ford objects to either receiving any payment on this basis. The objection is without merit, as both witnesses had to prepare for trial. Ms. Arrington's invoice indicates ten hours of trial preparation at $85.00 per hour and a testimony cancellation fee equivalent to four hours at $125.00 per hour. Ms. Arrington will spend additional time preparing for the next trial and the cancellation fee is a direct result of Sutter's misconduct. Therefore, ten hours at $85.00 per hour plus the $500.00 cancellation fee is a reasonable fee for Ms. Arrington, and $1,350.00 is included on her behalf in the sanctions award.

Dr. Dulaney's invoice indicates costs of $330.00 to review Lasar's file, $375.00 to update trial exhibits, and a $500.00 scheduling fee, all of which Lasar will incur again when the case goes to trial. Therefore, $1,205.00 is a reasonable fee for Dr. Dulaney's efforts and is included as part of the sanctions award.

5. Litigation Abstracts and Jury Consultants

Lasar requests payment of $4,776.35 for Litigation Abstracts and $1,875.00 for Jury Consultants, Inc. The charges of Litigation Abstracts will not be repeated, as the fruits of those services are useable at the next trial. Contrarily, the work of Jury Consultants, Inc., though optional, will likely be repeated at the next trial.[8] Thus, Lasar is awarded costs of

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[8] Ford has indicated that it does not object to the charges as unreasonable. While Ford does not concede Jury Consultants, Inc.

[Footnote continued on next page]

$1,875.00 for Jury Consultants, Inc. and no costs for Litigation Abstracts.

6. Other Expenses

Lasar also asks for reimbursement of $10,875.13 for deposition transcripts and $22,748.00 for copying expenses. These costs were not incurred as a result of Sutter's misconduct or the mistrial. The deposition transcripts and photocopies can be used at the next trial. An award of sanctions for these costs would not be reasonable.

8. Jury Costs

In addition to the expenses incurred by Lasar, the Court was required to pay to empanel a jury that was not used because of Sutter's wrongdoing. The Court must pay these expenses again, making it an appropriate sanction. Empaneling the jury cost a total of $5,496.15, including $9.00 for parking tickets, $1,615.00 for subsistence, $2,080.00 for attendance fees, and $1,792.15 for mileage. This cost is assessed against Ford alone.

9. Conclusion

The purpose of the sanctions imposed is to put the parties where they were two weeks before trial to the extent that is possible. Ford chose Sutter as its attorney and, as a consequence, is equally bound by his bad faith as it is by his success rate. Failure to award sanctions when Ford caused Lasar to lose his "day in court" would force Lasar to reincur many of the costs at a later time, through no fault of his own. The necessary balancing, then, is to determine the amount of sanctions that will fairly compensate Lasar for expenses he

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was a required expense, it is reasonable to expect such costs in a case of this magnitude.

would not have incurred but-for Sutter's misconduct, to vindicate Sutter's bad faith affront to the authority of the Court, and to ensure such abuses are not repeated, all while refraining from unnecessarily punishing Ford or Sutter.

Based on the analysis above, sanctions in the amount of $66,893.65 are reasonable. Of these sanctions, $61,397.50 are imposed jointly and severally against Ford and Sutter, with $5,496.15 being imposed against Ford alone.[9] While it was Sutter's conduct that led to the mistrial, he was acting as Ford's agent. Under my inherent authority, I may impose sanctions on the party or its attorney. In this case, I find it is appropriate to hold both responsible for the sanctions.

The amount of sanctions represents costs to Lasar and the Court that will be paid as a result of Sutter's misconduct that binds Ford. All of these expenses were incurred in preparing to bring the case to trial and will be reincurred in preparing for the next trial. Accordingly, the expenses are reasonable; were caused by Sutter's bad faith, intentional misconduct; are necessary to reimburse Lasar and the Court; and are necessary to vindicate the Court's authority and to ensure that Ford, through its lawyers, will not disregard or attempt to circumvent court orders in this or any other case.

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[9] I want to again emphasize that there is no evidence indicating that John Stephenson was in any way involved in violating the Court's orders or that he had any knowledge that Sutter was going to make the statements discussed above. To the contrary, I believe Mr. Stephenson was not involved and is not culpable for Sutter's misconduct. If Mr. Stephenson can be faulted at all, it is for failing to question Sutter about his incomplete application to appear pro hac vice. See discussion, infra. However, it is Sutter's conduct in his opening statement that led to a mistrial being declared, not his incomplete pro hac vice application.

B. Contempt

In the relevant passages of his opening statement, Sutter set forth a series of facts from which the jury was expected to draw logical inferences. In this case, the only logical inference that can be drawn from Sutter's comments is that Lasar was drinking, or drunk, before his accident and that he was not wearing a seatbelt.

At the time Sutter made his comments, the effect on the jury could not be known. This placed Lasar's counsel in a no-win situation. He could have ignored the reference, hoping against prejudice, yet having no idea how the jury reacted to the comments. Alternatively, he could have asked the Court to admonish the jury that any use of alcohol by Lasar was irrelevant and could not be considered. However, there was great risk that such an instruction would have drawn more attention to the issue and exacerbated what had already fouled the jury. Finally, Lasar's counsel could have attempted to counter the comments by introducing evidence that Lasar was not intoxicated at the time of the accident. This would have put Lasar in the position he sought to avoid through his motion in limine--defending himself against accusations or insinuations that he was drunk at the time of the wreck, an issue that is irrelevant to his legal claim that Ford's vehicle was defectively designed.

Sutter's intentional remarks were designed to inject prejudice and mislead the jury on an irrelevant issue that could not even be proved and are untenable. He maintains that his opening statement was carefully crafted to tell the story of what happened while avoiding any mention of alcohol use or non-use of seatbelts. This justification is disingenuous. Under Sutter's line of reasoning, the only way he would have violated the Court's order would have been by explicitly stating that Lasar was drinking before the accident and that he was not wearing a seatbelt. This ignores the jury's ability to draw logical inferences from his statements.

It is also belied by Sutter's initial argument that the order in limine tied his hands and kept the truth from the jury, and his later sworn testimony that in Ohio, the phrase "local establishments" means "restaurants" rather than "bars." (10/10/02 Tr. at 59- 60.)

When taking apart Sutter's statement, it is clear that his intent was to poison the jury by implanting in their minds that Lasar was drunk at the time of the wreck. Sutter said that Lasar and friends "visited several establishments." The implication of this is clear--Lasar was with friends visiting and drinking at several bars. There is no other situation, besides "bar-hopping," where a group of people might visit "several establishments." If it were churches, restaurants, or friends' houses, Sutter would have said as much. Despite Sutter's testimony that in Cleveland visiting establishments and playing pool would mean going to restaurants, such is not the case in Montana and everyone in court knew what he meant

That this was Sutter's intent becomes even more clear when examining the last portion of the statement. Sutter said that Lasar "made the decision to drive himself home," which implies that Lasar made a conscious decision to drive even though he knew he was intoxicated. There is no reason for using the phrase "made the decision" unless Sutter was attempting to imply that Lasar made an incorrect decision when he decided to drive home.

That Sutter intended to introduce the notion of alcohol into the jury's mind is even more clear when considering that the issue is irrelevant. Because this is a products liability case, the focus is on the design of the product, not the conduct of the parties. The events occurring two, four, eight or ten hours before the accident are not relevant, absent some causal link between those events and the accident. Ford not only failed to establish any causal link between the accident and any alcohol use by Lasar, it admitted that it did not have

any evidence that Lasar was intoxicated. Despite this failure of proof, Sutter tried to back-door the issue to poison the jury, not through evidence, but through careful and intentional "wordsmithing" in his opening speech to the jury.

The statements in Sutter's opening regarding alcohol are nothing short of contempt of Judge Erickson's and this Court's orders precluding any mention of alcohol use. His opening was well-crafted and, by his own admission, he chose his words carefully. However, his intent in choosing the words he did was not to tell a story about what happened, as he contends, but to poison the jury by implying that Lasar was drunk. In doing so, Sutter was attempting to gain a tactical advantage by focusing the jury's attention on Lasar's conduct rather than on the design of the product. This not only constitutes bad faith, but is a violation of Sutter's ethical duty and his duty as an officer of this Court.

Likewise, Sutter's conduct constitutes contempt of this Court. Clear and definite orders were entered by Judge Erickson and this Court precluding any evidence or discussion of alcohol. Sutter testified that he had read and understood these orders, yet he violated them in his opening statement. While civil contempt does not require a finding of willfulness, it is clear that Sutter willfully violated the in limine orders and did so in bad faith to gain a tactical advantage. Accordingly, Lawrence Sutter is adjudged to be in contempt of court for violating this Court's in limine order precluding evidence or discussion of Lasar's alcohol use.[10]

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[10] I do not find Sutter in contempt for violating the in limine order regarding non-use of seatbelts. While I believe Sutter also intended to violate that order by introducing to the jury that Lasar was not wearing a seatbelt, there had been discussion in voir dire by the Court and by Plaintiff's counsel about seatbelts and the jury

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C. Pro hac vice

Upon reflection, the egregious nature of Sutter's conduct becomes clear. His testimony at the October 10, 2002 contempt hearing belies his statement that he did not intend to violate the Court's orders in limine and, in fact, indicates a concerted effort, not only to poison the jurors, but to mislead the Court about his standing as an attorney.

On May 7, 2002, Sutter asked for the privilege of appearing in this court pro hac vice. His affidavit begins as follows:

> Lawrence A. Sutter, hereby applies to be admitted as attorney *pro hac vice* in the above-entitled case and states the following facts under *penalty of perjury*.

Pro Hac Vice Aff. of Lawrence A. Sutter, attached as Appendix C (emphasis added).

When Sutter filed his sworn application, under the Local Rules of Procedure of the United States District Court for the

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had been instructed they could not consider use or non-use of seatbelts in their deliberations. While Sutter's statement about "free-floating bodies" was highly charged and intended to introduce lack of seatbelts to the jury, the violation is not as egregious as that regarding alcohol. An instruction that the jury was not to consider seatbelt evidence would likely have countered any prejudice against Lasar from Sutter's statements. Contrarily, Sutter's statements about alcohol were so prejudicial that a limiting instruction would not have been effective and the jury would have been prejudiced against Lasar. Lasar is entitled to a fair day in court. Sutter cut him off by his wordsmithing in a way that could only be corrected by a mistrial.

District of Montana, Rule 83.3(e)(3)(E), he was required to state under penalty of perjury:

> (E) Whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent; the name of the court before which the proceedings were conducted; the date of the proceedings; and what action was taken in connection with those proceedings. A copy of any such contempt, discipline, or sanction order must be attached to the application.

Sutter did not disclose in his pro hac vice affidavit that he was twice held in contempt by Judge Patricia Cleary during a trial in Ohio state court. Sutter concealed the fact that in 1999, he filed an affidavit in the Ohio Supreme Court that states, among other things, "that [Judge Cleary] twice found affiant Sutter in contempt, ordered him incarcerated for periods of ten and thirty minutes...." *In re Disqualification of Cleary, Kaffeman, Exr., et al. v. MacLin, et al.*, 88 Ohio St.3d 1220, 723 N.E.2d 1106, 1107 (2000).

At the hearing in this case to determine whether Sutter should be sanctioned, held in contempt and deprived of his pro hac vice status, Sutter testified about his earlier contempt. First, he testified "*I was found in contempt* because I tried to make a record in the case and the judge would not let me have access to the record." (10/10/02 Tr. at 42.) When caught in a conflict between the language of L.R. 83.3(3)(E), and the language in the Cleary opinion, Sutter tried to back out of the bind by *changing* his sworn testimony. "Well, your honor, to be perfectly honest with you, I told John Stephenson two days ago that I had never been held in contempt, and *I truly believe that to be true.*" (*Id.* at 56 (emphasis

added).)[11] Then, referring to the Cleary case, he gave more sworn testimony, this time asserting that "... it says in that Opinion that I was held in contempt, and that's the only reason that I said I was held in contempt today." (*Id.* (emphasis added).) This sworn testimony was given despite the Ohio Supreme Court's reliance on Sutter's own affidavit acknowledging he had been held in contempt twice by Judge Cleary.

Sutter wasn't finished with his wordsmithing about contempt. Despite testifying on direct examination that "I was found in contempt ..." (*Id.* at 40.), he testified in response to the Court's questions as follows:

> There was no finding of contempt, there was just a statement that she was throwing me in jail and she put me in the holding cell for ten minutes. The same thing happened a little bit later in that day, there was no contempt hearing, there was no testimony, there was no finding of contempt that I remember from the record whatsoever. So the reason it's not there is very simple. *I didn't even know that there was an inclination that was found into contempt until I read the case again last night--yes, last night.*"

(*Id.* at 57.)[12]

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[11] I find this sworn testimony to be a continuation of Lawrence Sutter's deliberate effort to deceive the Court. It is impossible to reconcile his sworn testimony in this Court with affidavits he filed in Ohio. His testimony appears to be a willful deception.

[12] This is what his Ohio affidavit says:

[Footnote continued on next page]

Sutter's twisted testimony borders on perjury if it is not. He told the Ohio Supreme Court he was held in contempt twice by Judge Cleary and he did so in a sworn affidavit. He gave sworn testimony in this Court that "I was found in contempt...." When confronted with the notion that he had concealed that contempt finding here, he ended up testifying "I never considered myself to be in contempt in that case---". Sutter's sophistry can be summed up by a singular Latin phrase mertiri splendide, or to deceive magnificently.[13]

The only conclusion that can be reached from this totality of events is that Sutter knew he had been held in contempt by Judge Cleary and consciously decided not to disclose it to this Court because he did not want to risk having his pro hac vice application denied. This fits his pattern, as he did not state in his application that he had never been held in contempt. Rather, he simply omitted any reference to that requirement. This would allow him to argue that he had not lied to the Court. However, upon reviewing the affidavit

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[Footnote continued from previous page]

> 5. The most obvious hostility was demonstrated by Judge Cleary in the second day of trial when she twice incarcerated defense counsel.
>
> ...
>
> 6. Defense counsel was found in contempt a second time during the middle of his cross examination of the plaintiff's expert.... At that time defense counsel was again found in contempt and placed in the holding cell.

Ohio Aff. of Larence A. Sutter, attached as Appendix A.

[13] Also translated as "to lie magnificently." Another phrase that may apply is nescit vox missa reverti, or think twice before sounding off (literally "a word once uttered cannot be turned back").

filed in Ohio and his testimony here, it is clear that Sutter knew he had been held in contempt and omitted any reference to that finding to mislead the Court when it considered his pro hac vice application.

Admission pro hac vice is a privilege this Court grants to out-of-state counsel. In exchange, counsel is expected to abide by the rules and orders of this Court, to behave in an ethical manner, and otherwise act as an officer of the Court. Sutter has not met these standards; his actions were contemptuous, necessitated a mistrial, and caused undue expense and delay to Lasar, his counsel, the witnesses, and the Court. In trying to defend his actions, he has been dishonest, misleading, and evasive. In short, he is not the type of attorney that should be practicing in this Court. At some point, Lawrence Sutter needs to reflect on what it is he does, and what it is he should do. The law has no room for frustrated advocates, motivated by an attitude to win at any cost, who are intent to take matters in their own hands, without regard to the rules or orders of the Court. Accordingly, Lawrence Sutter's pro hac vice status is revoked and he will no longer be allowed to represent Ford in this case or any other case in the Missoula Division of the Montana Federal District Court.

Accordingly, IT IS HEREBY ORDERED that sanctions are imposed against Defendant Ford Motor Company and Lawrence A. Sutter, jointly and severally, in the amount of $61,397.50. An additional $5496.15 is imposed against Ford alone. All sanctions are due and payable immediately, with $61,397.50 to be paid to counsel for Plaintiff and $5,496.15 to be paid to the Clerk of Court, District of Montana. These amounts shall be paid within ten (10) days of the date of this Order.

IT IS FURTHER ORDERED that Lawrence A. Sutter is in contempt of court for violating the Court's order in limine regarding alcohol.

IT IS FURTHER ORDERED that Lawrence A. Sutter's admission pro hac vice is withdrawn, and he is no longer permitted to act as counsel for Ford in this matter.

Time for a status conference in this matter will be set by separate order. The Clerk is directed to immediately notify the parties of the entry of this Order.

APPENDIX A

IN THE SUPREME COURT OF OHIO
IN RE DISQUALIFICATION OF JUDGE PATRICIA CLEARY
Cuyahoga County Court of Common Pleas Court Case No. CV 369033
CASE NO. 99AP118
Dec. 6, 1999

AFFIDAVIT OF DISQUALIFICATION

Now comes defense counsel, Lawrence Sutter and Kenneth Abbarno, being first duly sworn and having personal knowledge of the facts contained therein, according to law, depose and state the following:

1. Lawrence Sutter is counsel of record for the defendants. Yellow Freight System, Inc. and Yellow Corporation, and Kenneth Abbarno is counsel of record for the defendant driver, Robert Maclin, in a wrongful death and survivorship action entitled Kay Marie Kaffeman, Individually and as Executrix of the Estate of Marvin Kaffeman, Deceased v. Robert E. Maclin, et al. under the above captioned case number in the Cuyahoga County Court of Common Pleas before Judge Cleary.

2. The decedent was killed when a 1,500 pound trash compactor fell from a tow motor being operated by Robert Maclin after Maclin delivered the freight to the decedent's place of

business. The 69 year old decedent was a friend of the driver who was removing the piece of equipment from his Yellow Freight truck as a favor. While Maclin was in the process of removing the trash compactor from the truck, the decedent came up along side the freight to help and would not follow Maclin's instructions to get away from the freight due to the danger.

3. A four day trial was recently completed on November 19, 1999 and resulted in a verdict for the plaintiff with a finding of 47% negligence on behalf of the plaintiff and 53% for defendants. The jury awarded $883,750.00 in compensatory damages (reduced to $468,787.50 due to the plaintiff's negligence) and $1,000,000.00 in punitive damages. Given that post-trial motions are due December 6, 1999, and that the plaintiff will most likely file a motion for pre-judgment interest, it is requested that Judge Clearly be disqualified from ruling on these and any other motions filed prior to appeal on the basis that Judge Cleary has formed a prejudice against the defendants, their counsel and/or their case within the meaning of R.C. § 2701.03.

4. Beginning at the final pre-trial conference and continuing throughout the trial, Judge Cleary, by her words, deeds, and demeanor, demonstrated a pattern of hostility toward the defendants as well as defense counsel. Most significantly, however. Judge Cleary's statements and actions demonstrate that she has formed a fixed anticipatory judgement regard-

ing the defendant's case and would rule adversely to them on any post trial motions.

5. The most obvious evidence of hostility was demonstrated by Judge Cleary on the second day of trial when she twice incarcerated defense counsel. On each occasion, Judge Cleary slammed the gavel and cleared the courtroom. She then ordered the sheriff to forcibly detain defense counsel and had him locked in a holding cell.

6. The basis of the first incarceration was defense counsel's statement:

Mr. Sutter: Let the record reflect that we requested to make a record.

(The court had repeatedly denied access to the record on the first day of trial and defense counsel was attempting to preserve the appeal rights of his client.) (See attached Trial Transcript, pp. 298-300)

7. Defense counsel was found in contempt a second time during the middle of his cross examination of the plaintiff's expert. By way of background, the court had previously granted the plaintiff's motion in limine to exclude the hearsay statements in the police report. However, the plaintiff's expert testified on direct examination and again during cross examination that he had relied on the police report in formulating his opinion. As a result, defense counsel was attempting to inquire into the report. At that time, defense counsel was again found in contempt and placed in the holding cell. Defense counsel was then required to complete his cross-examination immediately

upon returning from his jail cell to the courtroom. (See attached Trial Transcript, pp. 401-403)

8. The imprisonment of defense counsel was just the final straw in a long litany of conduct demonstrating the trial judge's preconceived hostility toward the defendants. The first indication that Judge Cleary had taken sides in the case was at the final pre-trial conference held on November 8, 1999. On that day, Judge Cleary told defense counsel that we had an "incompetent no good truck driver" operating a tow motor that killed a "nice person."

9. Judge Cleary additionally told defense counsel at the outset that "the defendants' negligence was not even an issue." Indeed, Judge Cleary stated at the pretrial conference that if she did not think she could be reversed in the court of appeals, she would direct negligence against both the driver and the trucking company.

10. Mr. Gordon is the City Operations Manager for Yellow Freight's Richfield terminal and was present at the pre-trial as the representative of Yellow Freight. Not content with that pronouncement, Judge Cleary proceeded to criticize Bill Gordon by calling him a "shop boy from Richfield."

11. At trial, Judge Cleary's attitude against the defendants, defense counsel, and their case, progressed from bad to worse. On the morning of the first day of trial, the court denied the defendants' request to have separate counsel to independently defend both the negligence and punitive damage claims. Without

motion, the court apparently decided to punish the defendants by denying them the right to a separate defense despite independent claims for negligence and punitive damages against each defendant. At the same time, the judge unilaterally struck the affirmative defenses asserted by the defendants in the pleadings that she deemed conflicted.

12. Throughout the course of the trial. Judge Cleary also showed extreme animosity toward the defendants' case. One of the many examples was the court's chastising of defense counsel in front of the jury after he asked the daughter of the deceased, who had been crying on direct examination for more than one-half hour, if she wanted to take a break before proceeding with cross examination. Judge Cleary admonished defense counsel on this occasion for making a "gratuitous comment" in front of the jury.

13. Another example of hostility by Judge Cleary occurred when defense counsel was attempting to view a demonstrative exhibit offered by the plaintiff that was being utilized to cross-examine Mr. Maclin. The court shouted at defense counsel, told him to "sit down" and told him he was "distracting" the jury.

14. Furthermore, Judge Cleary sustained as many as twelve objections adverse to the defense upon her own motion. In ruling on objections, she also shouted at defense counsel, rolled her eyes, and made other facial expressions of disdain directed toward the defendants and their counsel. No such derogatory

comments or other hostile behavior were ever directed at the plaintiff or her counsel.

15. Yet another example of Judge Cleary's favoritism toward the plaintiffs' case was in her sua sponte stopping of defense counsel on three occasions during voir dire. One instance occurred when defense counsel was attempting to inquire into the panel's familiarity, if any, with lawyers who represented family members in this case. Mrs. Kaffeman was represented by plaintiffs' counsel who was sitting at the trial table while the daughters were represented by additional counsel who was seated in the back of the courtroom. Defense counsel was unable to question whether any of the jurors were familiar with the additional lawyers seated in the back of the courtroom who represented other persons involved in the case.

16. In addition, after opening statements. Judge Cleary admonished defense counsel for inquiring of the jurors as to the word "accident". Judge Cleary ordered that the word "accident" not be used by the defense in the entirety of the case. Precluding the defense from using words like "accident" clearly reveals that Judge Cleary had made up her mind on how she wanted this case to result. (See attached Trial Transcript, p. 150)

17. Based upon all of the foregoing. Judge Cleary has formed a prejudice against the defendants, their counsel, and/or their case within the meaning of R.C. § 2701.03. In addition to her hostility toward defense counsel during the pretrial and trial proceedings.

Judge Cleary's comments indicate that she does not have an open mind such that a reasonable person could question whether the post trial motions will be governed by the law and the facts.

18. No hearing has been scheduled in this case.

/s/Lawrence Sutter, Esq. REMINGER & REMINGER CO., L.P.A. 113 St. Clair Avenue, 7th Floor Cleveland, Ohio 44114 Attorney for Defendants. Yellow Freight System, Inc. and Yellow Corporation

/s/Kenneth P. Abbarno, 113 St. Clair Avenue, 7th Floor Cleveland, Ohio 44114 Attorney for Defendant. Robert E. Maclin

* * * * * * *

STATE OF OHIO
COUNTY OF CUYAHOGA

SWORN to before me and SUBSCRIBED in my presence at Cleveland, Ohio this 3rd day of December, 1999.

/s/James T. Turek, Attorney at Law Notary Public-State of Ohio

CERTIFICATE OF SERVICE

I certify that copies of Affidavit of Disqualification were mailed, via ordinary U.S. Mail, this 3rd day of December, 1999 to:

Hon. Patricia A. Cleary
Cuyahoga County Court of Common Pleas
Justice Center
1200 Ontario Street Cleveland, OH 44113-1678
Philip A. Ciano

1995 Huntington Building
925 Euclid Avenue Cleveland, Ohio 44115,
Counsel for Plaintiff
George F. Lonjak
1995 The Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115, Counsel for Plaintiff
/s/Kenneth P. Abbarno

Lawrence Sutter Kenneth P. Abbarno

* * * * * * * *

tell you things about staying away from loads when they are suspended in the air?

THE COURT: Approach the side bar.

(Thereupon, a discussion was had at the side bar off the record.)

MR. SUTTER: Let the record reflect that we requested to make a record.

THE COURT: You may--we are going to take a recess right now, ladies and gentlemen. We will be on break for ten minutes.

(Thereupon, the jury was excused from the courtroom.)

(Thereupon, the following proceedings were had in open Court, outside the presence of the jury:)

THE COURT: You may be seated.

Prior to the commencement of trial, there was some motions in limine filed on--by both parties, and with regard to several of those motions, I discussed them on the record. In particular was a motion in limine concerning the testimony of this witness, and I had indicated

at that time that she would not be permitted to be used as an expert witness, to discuss whether or not her father was incorrect in standing in proximity to the truck at the time of the injury. I indicated that she certainly as a fact witness can testify with regard to the events and where she stood.

During the course of commencement of cross-examination, that issue was gotten into by defense counsel. I called him up to side bar, and I indicated that I had ruled on this previously and we had some discussion about the law, and I indicated he would get access to the record at a later time but I wasn't going to do it at this time.

We went to resume testimony, and Mr. Sutter at that time, in front of the jury, demanded access to the record. And that conduct in front of the jury is contemptuous. I am going to deal with it right now.

Mr. Sutter, you are remanded to the custody of the Sheriff's Office until the end of the break.

MR. SUTTER: Until?

THE COURT: All rise.

The end of the break.

And again, these are going to be escalating penalties. You have been cautioned about challenging me in front of the jury.

MR. SUTTER: Your Honor, may I make a record now?

THE COURT: I said later, and it is when I choose.

(Thereupon, a recess was taken.)

(Thereupon, the jury entered the courtroom, and the following proceedings were had in open Court:)

THE COURT: Miss, you may resume the stand.

Mr. Abbarno, you may proceed with your cross-examination.

MR. ABBARNO: Thank you.

BY MR. ABBARNO:

Q You knew Bobby from before April 6th of 1998, other times he had made deliveries?

A Yes.

Q And in those other times that he had made deliveries, he had parked his truck and trailer actually right out on Euclid Avenue; is that right?

A In different times, yes.

Q And he also parked the truck and trailer in that same general area on April 6th of 1998; isn't that right?

orientation of the pallet, did they?

A It was never asked.

Q All right. I looked in the police report last night--

THE COURT: That is sustained.

Q Did you see it in the police report?

THE COURT: That is sustained. And we are taking a recess at this time.

Ladies and gentlemen, we will stand on break until 1:30.

(Thereupon, the jury was excused from the courtroom.)

(Thereupon, the following proceedings were had in open Court, outside the presence of the jury:)

THE COURT: Before I begin, can you tell me one reason why I shouldn't have you spend the lunch hour in the lockup?

MR. SUTTER: What reason would that be for?

THE COURT: For defying my repeated rulings with regard to use of the police report, that I was not going to permit the hearsay that was contained therein to be entered into this case, and that's why I repeatedly did not permit you to make reference to the police report. I made multiple rulings on that point.

MR. SUTTER: I would agree with your Honor, until this witness testified that he relied upon it in direct examination. That clearly opens the door. And as this Court is well aware, a motion in limine is only preliminary in nature. Once he opens the door, I have the full right and the obligation to my client--

THE COURT: Unless I ruled otherwise, which I did, again, during the course of this statement that I had ruled that you were not to get into it.

Deputy, a half hour.

You need a time out.

And you are not going to go on to the record at this time.

MR. ABBARNO: Are you denying access at this time?

THE COURT: At this time. At 1:30 you can go on the record with regard to the daughter testifying as an expert concerning her training on the tow motor.

MR. ABBARNO: I also have some other items I would also like to make on the record as we stand here right now. I have other items with respect to the manner that this trial is proceeding, your Honor, and I would like to have the opportunity, because I have the right, also, likewise, to make that record, and I thus far have been denied that ability on four occasions.

THE COURT: I disagree with that. I, as an experienced trial attorney myself, I am very cognizant of the use of the record, and I understand when it is necessary to preserve an objection for the record. If you want to make a motion, you can make it.

The only outstanding matter with regard to access to the record concerns the daughter testifying as an expert concerning her so-called training by her father.

Off the record.

We are in recess until 1:30.

(Thereupon, a luncheon recess was taken until 1:30 p.m., Wednesday, November 17, 1999, at which time the following further proceedings were had:)

Also, I don't want any further mischaracterization of these events to the jury with the words of accident. Obviously all the negligence cases involve by their very nature accidents, so I think that's misleading to the jury. It is not going to happen again.

The motion in limine with regard to the testimony of the decedent's daughter, Anita Savastano, is granted. She obviously can testify with regard to anything she saw, but she is not testifying as an expert in this case and she will not be permitted to so testify.

Is there anything specific you need for me to discuss?

MR. ABBARNO: Yes, your Honor.

From us first, with the punitive damages claim pending and as it relates to Yellow Freight's activities in handling the Harmony Enterprises freight, the fact that we have never mishandled this type of freight is relevant as it relates to the punitive damages claim of packaging that product, and specifically putting it on a pallet for travel throughout our system.

In addition, Mr. Cramer will testify that he doesn't--he is not an expert in shipping. Once they

SUPPLEMENTAL AFFIDAVIT OF DISQUALIFICATION

Now comes defense counsel, Lawrence A. Sutter and Kenneth P. Abbarno, being first duly sworn and having personal knowledge of the facts contained therein, according to

law, depose and state the following by way of a Supplemental Affidavit of Disqualification:

1. Based upon Judge Cleary's response, it is evident that Judge Cleary has formed a prejudice against the defendants, their counsel and/or their case within the meaning R.C. § 2701.03. Judge Cleary's admits her preconceived notion of the result in this case by virtue of the following statement in her response:

Knowing liability was clear and a large award would be leveled against their client, trial counsel's acts of disrespect and misconduct escalated with the progress of trial.

This comment amplifies that Judge Cleary had made up her mind as to how she wanted this case to result prior to impaneling the jury. Despite Judge Cleary's allegation that "liability was clear" the jury determined that the plaintiff was 47% negligent.

2. The Motion for Summary Judgment in no way attributed negligence and causation solely to Mr. Maclin. Rather, the Motion for Summary Judgment sought to assert a defense of loaned servant. If this defense were adopted by the court then negligence claims against Mr. Maclin would have been barred by virtue of the doctrine of fellow-servant immunity.

3. Defense counsel was first informed of the inability to raise this issue at trial due to an "ethical conflict" on the morning of trial. (See attached trial transcript, pp. 3-7). This "ethical conflict" was raised sua sponte by the court.

4. The court's prejudicial attitude is further demonstrated by comments made in denying defense counsel's motion for a mistrial. The court stated:

I find your comments to be untrue with regard to my shouting. My problem was I was forced to raise my voice. I assumed since counsel are admitted members of the bar, that they are not stupid, and so when I would rule and my rulings would be ignored. I was assuming that it was because I could not be heard over the ventilation system, so I raised my voice.

(See trial transcript at p. 574)

5. Judge Cleary has also admitted that she has formed a prejudice against defendant by falsely accusing defense counsel of "purposeful and calculated" actions during trial to obtain a mistrial. The record of the trial does not support this allegation.

6. Defense counsel further state that to the extent Judge Cleary has suggested that statements in the affidavit are untrue, the Supreme Court is invited to review the entire trial transcript which will be provided upon request.

7. The record, Affidavit of Disqualification, Response of Judgment and this Supplemental Affidavit demonstrate that Judge Cleary has formed a prejudice against the defendants, their counsel and/or their case within the meaning of R.C. § 2701.03. Judge Cleary does not have an open mind such that a reasonable person could question whether the

post-trial motions will be governed by the law and facts.

/s/Lawrence Sutter, Esq. REMINGER & REMINGER CO., L.P.A. 113 St. Clair Avenue, 7th Floor Cleveland, Ohio 44114 Attorney for Defendants, Yellow Freight System, Inc. and Yellow Corporation

/s/Kenneth P. Abbarno, Esq. REMINGER & REMINGER CO., L.P.A. 113 St. Clair Avenue, 7th Floor Cleveland, Ohio 44114 Attorney for Defendant, Robert E. Maclin

* * * * * * *

STATE OF OHIO
COUNTY OF CUYAHOGA

SWORN to me before and SUBSCRIBED in my presence at Cleveland, Ohio this 29th day of December, 1999.

/s/Barbara Marie Kastak Notary Public, State of Ohio

CERTIFICATE OF SERVICE

I certify that copies of the affidavit of Disqualification were mailed, via ordinary U.S. Mail, this 3d day of December, 1999 to:

Hon. Patricia A. Cleary
Cuyahoga County Court of Common Pleas
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113-1678
Philip A. Ciano
1995 Huntington Building 925 Euclid Avenue
Cleveland, Ohio, Counsel for Plaintiff
George F. Lonjak
1995 The Huntington Building

925 Euclid Avenue
Cleveland, Ohio, Counsel for Plaintiff

/s/Kenneth P. Abbarno

Lawrence Sutter

Kenneth P. Abbarno

* * * * * * *

TUESDAY MORNING SESSION, NOVEMBER 16, 1999

THE COURT: The Court will proceed with instructions with regard to voir dire.

I have gotten some pleadings from Larry Sutter, indicating he is now new counsel for Yellow Freight. Is that correct?

MR. SUTTER: Yes, your Honor.

THE COURT: And you work for Reminger's office?

MR. SUTTER: I do.

THE COURT: During the course of the final pre-trial in this matter, in reading over proposed jury instructions, I was troubled by the fact that there was one counsel representing Robert Maclin and Yellow Freight, because there is an intent by Yellow Freight to escape liability in this matter by claiming that Robert Maclin was not acting within the scope of his employment, and that type of a position would place, obviously, Mr. Maclin in harm's way, and I'm not comfortable with the idea that one law firm represented both of these individuals. And I don't see how bringing in a second counsel cures that defect or ethical problem.

MR. SUTTER: Well, your Honor, as you know, I was not involved in the earlier part of the litigation. Mr. Abbarno and I have not collaborated on this case. I have entered as separate counsel for Yellow Freight and intend to represent their interests in this matter.

THE COURT: The ethical problem still stands there.

And just going over the pleadings in this case last night, I think it was--I can't find my notes before me--I think it is the 23rd count of the complaint that references this. So this ethical problem existed long ago.

And your comments that you haven't had access or used any of the materials in this case to prepare yourself to represent Yellow Freight really doesn't pass the straight face case with me. I can't believe you didn't read the briefs or have access to the depositions.

MR. SUTTER: I did read depositions.

THE COURT: Who prepared the depositions?

MR. SUTTER: Who prepared the depositions?

THE COURT: Yes, who participated in creating and preparing those depositions?

MR. SUTTER: I don't understand what your question is. Counsel of record obviously was at the deposition. All I did was review the official court transcripts, which are the depositions.

THE COURT: I think there is a grievous ethical problem here with the same law firm representing two people or two entities with conflicting interests in this case, and at this posture I really don't know what the appropriate way to proceed is. I'm very disinclined to continue this case.

I'm going to preclude the introduction of the conflicting defense in this matter, and I'm going to preclude any attempt by Yellow Freight to place Mr. Maclin as solely responsible for this accident. I don't know how else to cure this defect.

MR. SUTTER: Well, I would like my objection to your ruling noted for the record. And I want to know whether you are including in that ruling my ability to differentiate between the punitive damage claim and the negligence claims.

Because I believe the Eighth District has clearly indicated that Yellow Freight does have a right to separate counsel on the punitive damage issue.

THE COURT: I think that those ethical matters should have been handled long ago in this particular matter. This is not a conflicting defense that suddenly arose during the course of discovery, based on the response or the answer that I referenced earlier, the paragraph 23 that I referenced to.

If you want to give me some case law on it, and obviously keeping in mind the ethical problem in this case.

Unless you have a better suggestion, on behalf of the plaintiffs.

MR. CIANO: No, your Honor. We don't at this time. I had asked Mr. Sutter for some case law, which we got last night, and I did review the cases. Neither of them, from my review, seem to support the position that they have taken.

THE COURT: Position about what?

MR. CIANO: As far as splitting their counsel.

And I told them we would not object because it wasn't an ethical issue on our behalf. I just asked for the legal position on it, and he gave us the cases, and they didn't seem to support their position, from my review. We still haven't received a motion to withdraw from Mr. Abbarno. We've been told at last week's depositions at one point they are out and at one point they are in.

THE COURT: This is a hornet's nest of ethical problems.

I made my decision on it. If you want to deal with it in a different form, you are welcome to do that.

The jury is on their way up.

During the course of voir dire, I don't want counsel repeating any questions that I ask the jurors. More appropriate,

you are to ask questions to the panel generally instead of repeating the same instructions over and over again.

I will be giving the jurors the instructions of law at the end of the case. Therefore, I don't want counsel rephrasing the instructions for the jurors during voir dire. I'm afraid it will confuse them. For example, I don't want you talking about what burden of proof is and things like that and comparing civil to criminal cases. I will very clearly tell them what the burden of proof is in a civil case.

You are not allowed to ask the jurors what TV shows they watch, what magazines they receive, what bumper stickers they have on their car, about their medical histories, that of their children, spouse, close friends and relatives. We are going to try to keep this to the relevant issues.

case to attempt to provoke a mistrial, but it didn't work in this case.

I find your comments to be untrue with regard to shouting. My problem was I was forced to raise my voice. I assumed since counsel are admitted members of the bar, that they are not stupid, and so when I would rule and my rulings would be ignored, I was assuming that it was because I could not be heard over the ventilation system, so I raised my voice.

Counsel were not chastised in front of the jury.

We are going to resume the trial. The Court has to recess at 11:30 until 1:30 because of a prior commitment, and I hope to have the jury instructions at least typed up so the copies can be made available to counsel over the lunch break. But we are going to proceed.

So you can bring the jury out.

(Thereupon, the jury entered the courtroom, and the following proceedings were had in open Court:)

THE COURT: And on behalf of the plaintiff.

MR. CIANO: Your Honor, at this time

APPENDIX B

RULE 83

DISTRICT COURT RULES AND DIRECTIVES 83.1 DECORUM.

(a) Opening Court. When the Court first convenes in the morning and after the noon recess, the Court Crier shall, in an appropriate manner, announce the opening of court, and all persons in attendance in the courtroom shall rise until the judge has taken the bench.

(b) Robes. Judges of this Court shall wear judicial robes when presiding in open court.

83.2 ATTIRE

Lawyers shall wear appropriate professional attire for all proceedings before the Court.

83.3 ADMISSION TO AND PRACTICE IN THIS COURT.

(a) Admission to the Bar of this Court. Admission to the Bar of this Court is limited to attorneys of good moral character who are members in good standing of the State Bar of Montana.

(b) Procedure for admission. Each applicant for admission shall present to the clerk a written petition for admission, stating the applicant's residence and the date of admission to the State Bar of Montana. The petition shall be accompanied by a certificate of a member of the Bar of this Court that the applicant is of good moral character and a member in good standing of the State Bar of Montana. Upon qualification, the applicant may be admitted, upon oral motion or without appearing, as determined by the Court, by signing the prescribed oath and paying the prescribed fee.

(c) Practice in this Court. Except as otherwise provided in this Rule, only members of the Bar of this Court shall practice in this Court.

(d) Attorneys for the United States. An attorney who is not eligible for admission under L.R. 83.3(a) but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of any state, or of any territory or insular possession of the United States, and who is of good moral character, may practice in this Court in any matter in which that attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers. Attorneys so permitted to practice in this Court are subject to the jurisdiction of the Court with respect to their conduct to the same extent as members of the Bar of this Court.

(e) Pro hac vice.

(1) An attorney not eligible for admission under L.R. 83.3(a), but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of any state or of any territory or insular possession of the United States, who is of good moral character, and who has been retained to appear in this Court, may, upon written application to and in the discretion of the presiding judge, be permitted to appear and participate in a particular case.

(2) Unless authorized by the Constitution of the United States or acts of Congress, an attorney is not eligible to practice pursuant to this subsection if (A) the attorney resides in Montana, or (B) the attorney is regularly employed in Montana.

(3) Application to appear pro hac vice shall be filed and served on all parties, and shall state, under penalty of perjury:

(A) the attorney's state or territory of residence and office addresses;

(B) by what court(s) the attorney has been admitted to practice, the date(s) of admission, and the date(s) of termination of admission, if any;

(C) that the attorney is in good standing and eligible to practice in these courts;

(D) that the attorney is not currently suspended or disbarred in any other court.

(E) whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent; the name of the court before which the proceedings were conducted; the date of the proceedings; and what action was taken in connection with those proceedings. A copy of any such contempt, discipline, or sanction order must be attached to the application;

(F) if the attorney has concurrently or within the year preceding the date of application made any pro hac vice application to this Court, the title and the cause number of each matter in which an application was made, the date of application, and whether or not the application was granted; and

(G) the name, address, telephone number, and written consent of local counsel who is a member of the Bar of this Court and with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom papers shall be served, and who will be responsible to participate as required under subsection (f) of this Rule.

(f) Duties of local counsel. Unless otherwise ordered, local counsel designated pursuant to this Rule shall sign all pleadings, motions and briefs. In all cases, local counsel shall participate actively in all phases of the case, including, but not limited to, attendance at depositions and court proceedings, preparation of discovery responses and briefs, and all other activities to the extent necessary for local counsel to be prepared to go forward with the case at all times. The Court, upon motion by local counsel, may waive this Rule on a showing of extraordinary circumstances. Upon waiver of this Rule by the Court, all papers subsequently filed shall be signed by counsel actively involved in the case. Such a waiver is not to be routinely granted.

83.4 NOTICE OF CHANGE OF STATUS.

An attorney who is a member of the Bar of this Court or who has been permitted to practice in this Court under L.R. 83.3(a), (d), or (e) shall promptly notify the Court of any change in the attorney's status in another jurisdiction which would make the attorney ineligible for membership in the Bar of this Court under L.R. 83.3 or ineligible to practice in this Court under L.R. 83.3.

83.5 ATTORNEY UNDER APPOINTMENT OF COURT.

(a) Compensation. It shall be the duty of an attorney to act without compensation whenever the attorney is appointed

by the Court to represent an indigent person in any proceeding not covered by the provisions of 18 U.S.C. § 3006A.

(b) Gratuities. Attorneys appointed by the Court to represent an indigent person shall not, without specific approval of the Court, accept or solicit any money for any purpose from any person on account of the representation. Any attorney violating this Rule will be disciplined by the Court. If it comes to the attention of any attorney

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

STEVEN MARK LASAR, Plaintiff,

vs.

FORD MOTOR COMPANY, Defendant.

Cause No. CV-99-177-M-DWM

May 7, 2002.

PRO HAC VICE APPLICATION TO APPEAR AS COUNSEL IN A PARTICULAR CASE

LAWRENCE A. SUTTER, hereby applies to be admitted as attorney pro hac vice in the above-entitled case and states the following facts under penalty of perjury:

1.

I reside in the State of Ohio and my office address is as follows:

Sutter O'Connell Mannion & Farchione
3600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
Phone: (216) 928-2200

Fax: (216) 928-4400
E-mail: lsutter@sutter-law.com

2.

I have been licensed to practice law in the State of Ohio. The Supreme Court of Ohio and USDC Federal District of Ohio. I have also been admitted pro hac vice in the United States District Courts and State Courts of General Jurisdiction in many states.

3.

At all times since being admitted, I have been and continue to be a member in good standing authorized to practice before the highest courts in this state.

4.

I am not currently suspended or disbarred in any court.

5.

In the past year, the only application I have made for pro hac vice admission was in the United States District Court, Great Falls Division, in the case captioned Ed Noble, et al. v. Ford Motor Company, et al. Case No.: CV-01- 106-GF-SHE.

6.

Co-counsel in this case is John D. Stephenson whose address is as follows:

John D. Stephenson
Jardine, Stephenson, Blewett & Weaver, P.C.
7th Floor, U.S. Bank Building
P.O. Box 2269
Great Falls, MT 59403
Telephone: (406) 727-5000

Mr. Stephenson has consented to the granting of this application.

7.

If admitted, I agree to observe the following conditions:

a. I will act as co-lead counsel.

b. John Stephenson shall act as the other co-lead counsel and shall be kept advised of all developments in the case with the authority to act as attorney of record for all purposes.

c. Both lead counsel shall conduct the trial of the case and shall appear at all hearings related to the case.

d. Briefs and pleadings prepared in my office shall constitute my own work product and shall be signed by me. Montana counsel shall not sign briefs, pleadings and motions prepared in my office.

DATED this ___ day of April, 2002.

/s/Lawrence A. Sutter

The undersigned, John D. Stephenson, hereby consents to the granting of this pro hac vice application.

/s/John D. Stephenson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PRO HAC VICE APPLICATION TO APPEAR AS COUNSEL IN A PARTICULAR CASE** was served upon the following by mail, hand-delivery, Federal Express or Fax:

[X]U.S. mail []Federal Express
[]Hand-delivery []Fax
Paul C. Meismer CAREY, MEISMER &
McKEON, PLLP
225 West Broadway

P.O. Box 8659
Missoula, MT 59807-8659
Michael D. Weisman
Daniel T.S. Hefferman
Pierce J. Reed
WEISMAN & ASSOCIATES, P.C.
114 State Street
Boston, MA 02109

DATED this 7th day of May, 2002.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FILED Missoula, MT
March 27, 2003
Patrick E. Duffy, Deputy Clerk
By Carol A. Dahley

STEVEN MARK LASAR,	)	CV 9-177-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant.	)	
	)	

On February 7, 2003, the Court held a status conference in this case at which time it orally denied Defendant's motion for reconsideration and motion for stay pending appeal. Defendant has not established extraordinary circumstances necessary for the Court to reconsider its contempt/sanctions or-

der.[1] Each point raised by Defendant in its request for reconsideration has already been considered by the Court.[2]

Nor has Defendant established cause for staying imposition of the sanctions pending appeal. Defendant has found another attorney to represent it at trial, an attorney who was previously involved in the case. Trial has been set for September 2003, giving counsel plenty of time to prepare. Finally, the monetary sanctions are subject to repayment should

---

[1] Because there Federal Rules of Civil Procedure do not provide for a "motion to reconsider, the Court considers Defendant's motion as a motion to alter or amend a previous order under Rule 59(e). Granting a motion to alter or amend is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). Such relief is appropriate if the court (1) is presented with newly discovered evidence, (2) committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). However, granting a motion to alter or amend is not appropriate if the legal arguments or factual assertions could reasonably have been raised earlier in the litigation. *Id.*

[2] To the extent Defendant argues that revoking Sutter's *pro hac vice* status deprived him of a liberty interest, the Court notes that the sanction is narrowly drawn. Sutter is precluded from practicing only in the Missoula Division of the District of Montana, a prohibition that applies to Sutter only, not to his firm. Additionally, Sutter's failure to disclose his prior contempt sanction was not *the* reason for holding him in contempt or for revoking his *pro hac vice* status. Rather, it was additional evidence of his dishonesty, and it was considered as a result of his own testimony.

the Court be reversed on appeal. Thus, there is not reason to stay imposition of the contempt/sanctions order.

Accordingly, IT IS HEREBY ORDERED that Defendant's motion to stay pending appeal (dkt #187) and motion for reconsideration (dkt # 188) are DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion in limine to preclude evidence that the vehicle was state-of-the-art is DENIED subject to renewal. Plaintiff may orally renew his motion at the final pretrial conference and the Court will consider it based on the briefing and documents currently submitted.

DATED this 27th day of March, 2003.

Donald W. Molloy, Chief Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED April 19, 2005
Cathy A. Catterson, Clerk
U.S. Court of Appeals

STEVEN MARK LASAR, Plaintiff-Appellee, v. FORD MOTOR COMPANY, Defendant-Appellant,. and LAWRENCE SUTTER, Appellant.	No. 03-35093, 03-35486 D.C. No. CV-99-00177-DWM District Court of Montana, Missoula ORDER

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

Judges Tashima, Paez, and Bea have voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35. The

petition for panel rehearing and rehearing en banc is DENIED.

APPENDIX E

RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

RULE 83. DISTRICT COURT RULES AND DIRECTIVES

83.3 ADMISSION TO AND PRACTICE IN THIS COURT

(a) Admission to the Bar of this Court. Admission to the Bar of this Court is limited to attorneys of good moral character who are members in good standing of the State Bar of Montana.

(b) Procedure for Admission. Each applicant for admission shall present to the clerk a written petition for admission, stating the applicant's residence and the date of admission to the State Bar of Montana. The petition shall be accompanied by a certificate of a member of the Bar of this Court that the applicant is of good moral character and a member in good standing of the State Bar of Montana. Upon qualification, the applicant may be admitted, upon oral motion or without appearing, as determined by the Court, by signing the prescribed oath and paying the prescribed fee.

(c) Practice in this Court. Except as otherwise provided in this Rule, only members of the Bar of this Court who are classified as active members in good standing by the State Bar of Montana shall practice in this Court.

(d) Attorneys for the United States. An attorney who is not eligible for admission under L.R. 83.3(a) but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of

any state, or of any territory or insular possession of the United States, and who is of good moral character, may practice in this Court in any matter in which that attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers. Attorneys so permitted to practice in this Court are subject to the jurisdiction of the Court with respect to their conduct to the same extent as members of the Bar of this Court.

(e) Pro Hac Vice.

(1) An attorney not eligible for admission under L.R. 83.3(a), but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of any state or of any territory or insular possession of the United States, who is of good moral character, and who has been retained to appear in this Court, may, upon written application to and in the discretion of the presiding judge, be permitted to appear and participate in a particular case.

(2) Unless authorized by the Constitution of the United States or acts of Congress, an attorney is not eligible to practice pursuant to this subsection if (A) the attorney resides in Montana, or (B) the attorney is regularly employed in Montana.

(3) An attorney applying to appear pro hac vice shall file and serve on all parties an application stating, under penalty of perjury:

(A) the attorney's state or territory of residence and office addresses;

(B) by what court(s) the attorney has been admitted to practice, the date(s) of admission, and the date(s) of termination of admission, if any;

(C) that the attorney is in good standing and eligible to practice in these courts;

(D) that the attorney is not currently suspended or disbarred in any other court,

(E) whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent; the name of the court before which the proceedings were conducted; the date of the proceedings; and what action was taken in connection with those proceedings. A copy of any such contempt, discipline, or sanction order must be attached to the application;

(F) if the attorney has concurrently or within the year preceding the date of application made any pro hac vice application to this Court, the title and the cause number of each matter in which an application was made, the date of application, and whether or not the application was granted; and

(G) the name, address, telephone number, and written consent of local counsel who is a member of the Bar of this Court and with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom papers shall be served, and who will be responsible to participate as required under subsection (f) of this Rule.

(4) Permission to appear pro hac vice is granted or denied solely at the discretion of the presiding judge. Revocation of permission to appear pro hac vice pertains to the instant case only, and does not constitute disbarment from the Bar of this Court.

(f) Duties of Local Counsel. Unless otherwise ordered, local counsel designated pursuant to this Rule shall sign all pleadings, motions and briefs. In all cases, local counsel shall participate actively in all phases of the case, including, but not limited to, attendance at depositions and court proceedings, preparation of discovery responses and briefs, and all other activities to the extent necessary for local counsel to

be prepared to go forward with the case at all times. The Court, upon motion by local counsel, may waive this Rule on a showing of extraordinary circumstances. Upon waiver of this Rule by the Court, all papers subsequently filed shall be signed by counsel actively involved in the case. Such a waiver is not to be routinely granted.

83.14 SUSPENSION, DISBARMENT AND DISCIPLINE OF ATTORNEYS

(a) Jurisdiction. Any attorney admitted to practice before this Court, any attorney admitted for a particular proceeding, or any attorney otherwise authorized to appear before this Court is subject to the disciplinary jurisdiction of this Court.

"Chief Judge," as used in this Rule, means the Chief Judge of the district or another district judge designated by the Chief Judge.

Nothing contained in this Rule shall be construed to limit or deny the Court such powers as are necessary to maintain control over proceedings before it, such as contempt power.

(b) Grounds for Discipline. An attorney may be subject to disciplinary action as set forth in this Rule for any of the following:

(1) suspension, disbarment or other disciplinary sanction by a competent authority in any state, federal, territory, commonwealth or foreign jurisdiction;

(2) conviction any crime of which the elements or underlying facts may impact the attorney's fitness to practice law;

(3) any act or omission, including incompetency or incapacity, which violates the standards of this Court as set forth in L.R. 83.13;

(4) violation of any court order; or

(5) misrepresentation or concealment of a material fact made in an application for admission to the Bar of this Court or in a pro hac vice or reinstatement application.

Nothing in this section precludes the Court or any judge of the Court from assessing sanctions for violations of local

practice and procedure rules or other applicable statutes and rules.

(c) Types of Discipline. Discipline may consist of one or more of the following:

(1) disbarment;

(2) suspension;

(3) public censure;

(4) private reprimand;

(5) probation with or without conditions;

(6) restitution;

(7) fines and/or assessment of costs; and

(8) referral to appropriate disciplinary authority.

(d) Reciprocal Discipline.

(1) An attorney subject to this Court's disciplinary jurisdiction shall, upon being notified of pending formal professional disciplinary action in any jurisdiction, promptly inform the Chief Judge of such action and provide the Chief Judge with a copy of any disciplinary letter, notice, order, or other paper received by the attorney.

(2) An attorney subject to this Court's disciplinary jurisdiction shall, upon receipt of a copy of an order or other official notification indicating that he or she has been subjected to discipline in another jurisdiction, provide the Chief Judge a copy of said order.

(3) Upon receipt of an order or other official notification concerning discipline either from the disciplined attorney or from another jurisdiction, the Chief Judge shall forthwith issue a show cause order to the subject attorney containing:

(A) a copy of the order or other official notification from the other jurisdiction;

(B) an order directing the attorney to show cause within 30 days why the identical discipline in this Court is unwarranted;

(C) an order directing that the attorney produce a certified copy of the entire record from the other jurisdiction, or bear the burden of persuading the Court that less than the entire record will suffice; and

(D) notification that failure by the attorney to respond to the order may be deemed acquiescence to reciprocal discipline.

(4) If no response is timely filed, the Chief Judge shall impose identical discipline no less than 30 days after service of the show cause order.

(5) If a response is timely filed, the Chief Judge shall impose identical discipline unless one or more of the following elements clearly appears from the record on which the discipline is predicated:

(A) the procedure in the other jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) there was such an infirmity of proof establishing the misconduct as to give rise to a clear conviction that the Court should not accept as final the other jurisdiction's conclusion on that subject; or

(C) other substantial reasons exist so as to justify not accepting the other jurisdiction's conclusions.

(6) Where the Chief Judge finds one or more of the three elements set forth in subsection (5), the Chief Judge shall enter any order deemed appropriate.

(7) The subject attorney may petition the Chief Judge at any time to keep disciplinary proceedings confidential.

(e) Attorneys Convicted of Crimes.

(1) Upon the Chief Judge's receipt of reliable proof that an attorney has been convicted of a crime the elements or underlying facts of which may impact the attorney's fitness to practice law, the Chief Judge shall enter an order suspending the attorney from engaging in the practice of law in this District pending further order. This shall be done whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal. Upon good cause shown, the Chief Judge may set aside such suspension where it appears to be in the interest of justice to do so.

(2) The Chief Judge shall forthwith issue an order to the subject attorney directing the attorney to show cause why the criminal conviction or underlying facts do not impact the attorney's fitness to practice law.

(3) Final conviction of a crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding. For the purposes of this Rule, a judgment of conviction is deemed final when the availability of appeal has been exhausted.

(4) Immediately upon the Chief Judge's receipt of reliable proof demonstrating that the underlying conviction for a crime has been reversed, any suspension order entered under subsection (e)(1) and any other discipline imposed as a result of the conviction shall be vacated.

(5) Notwithstanding the reversal of a conviction, the Court retains the authority to proceed with disciplinary action based on the conduct underlying the reversed conviction.

(f) Grievances; Confidentiality. Grievances alleging grounds for discipline under subsection (b), including grievances initiated by judges other than the Chief Judge, shall be filed with the Chief Judge, and shall remain under seal

throughout investigation unless and until the Chief Judge determines that the matter is referred for filing of a formal complaint. Grievances submitted by persons other than a judge of the District shall be verified.

(g) Designation of Investigators. Upon determination that a grievance alleging violation of subsection (b) merits investigation, the Chief Judge shall designate one or more members of this Court's Bar to investigate the allegations of misconduct.

(h) Investigation Procedure.

(1) The designated investigators shall conduct such investigation as is warranted by the circumstances and shall report to the Chief Judge on the merits as soon as practicable. Investigators are authorized to administer oaths and affirmations, to issue subpoenas to compel attendance by witnesses and responding attorneys, and to compel production of documents. The costs of these activities will initially be borne by the Court, with the authority to impose costs if the attorney is disciplined.

(2) The report shall include copies of statements of witnesses, all documentary evidence relative to the complaint, and a summary of findings.

(3) No report shall be submitted until the respondent attorney has had a reasonable opportunity to submit to the investigators any evidence or statements relative to the complaint. Such evidence or statements shall be attached to the investigation report.

(4) The report, or the investigators if they disagree, shall recommend one of the following courses of action:

(A) if the grievance warrants discipline, filing of a formal complaint and a hearing;

(B) if the conduct complained of does not warrant a formal complaint and hearing, but does require intervention, an appropriate disposition of the grievance;

(C) if neither a formal complaint and hearing nor intervention is warranted, dismissal of the grievance.

(i) Report and Disposition.

(1) If, after review of the investigation report, the Chief Judge determines the complaint is unfounded or of a trivial nature, the grievance shall be dismissed.

(2) If, after review of the investigation report, the Chief Judge determines the matter warrants further consideration, the Chief Judge shall then either delegate a prosecutor to file a complaint pursuant to subsection (j) or refer the matter to the appropriate state or other disciplinary body.

(j) Prosecuting Counsel.

(1) Counsel selected by the Chief Judge is authorized to prosecute allegations of misconduct. Any person delegated by the Court to prosecute any matter is authorized to administer oaths and affirmations, to issue subpoenas to compel attendance by witnesses and responding attorneys, and to compel production of documents. The costs of these activities will initially be borne by the Court, with the authority to impose costs if the attorney is disciplined.

(2) Promptly after designation, counsel shall prepare a formal complaint. The complaint will be filed with the Court as a civil action and an Article III judge (excluding the Chief Judge and any judge who initiated the grievance) shall be randomly assigned.

(3) Counsel is authorized to conduct further investigation as necessary regarding the alleged misconduct of the respondent attorney and shall be responsible for presenting to the Court evidence relative to the complaint.

(k) Immunity. The investigation, prosecution, and determination of a disciplinary matter are inherently judicial functions and involve the exercise of discretionary judgment. As delegates of the Court performing those judicial functions, investigating counsel and prosecuting counsel, and all other investigators and staff are immune from civil suit and liability for any conduct in the course of their official duties to the maximum extent allowed by law. Such immunity extends to all cases, whether previously decided, currently pending, or to be investigated and prosecuted.

(l) Notice and Hearing.

(1) *Complaint*. Formal disciplinary proceedings before the Court shall be instituted by the filing of a complaint, which shall be sufficiently clear and specific to inform the respondent attorney of the alleged misconduct. A copy of the complaint shall be served, in conformity with Federal Rule of Civil Procedure 4, upon the respondent attorney.

(2) *Case Management*. After the complaint is filed and a judge assigned, the Court shall schedule a case management conference at the earliest opportunity to determine the extent to which the case should be expedited and whether and to what extent the Federal Rules of Civil Procedure should be applied or modified for the proceeding.

(3) *Applicable Rules*. The Federal Rules of Civil Procedure may be modified by the Court. The Federal Rules of Evidence will apply.

(4) *Standard of Proof*. Proof of the alleged conduct shall be by clear and convincing evidence.

(5) *Jury*. There is no right to a jury at the disciplinary hearing.

(6) *Findings and Conclusions*. Within a reasonable time after the hearing, the Court shall make findings of fact and conclusions of law and specify the disciplinary action, if any,

to be taken. If discipline is to be ordered by the Court, the respondent shall have the opportunity to present evidence or argument in mitigation. If the Court gives notice before the hearing, mitigating evidence may be required to be presented at the disciplinary hearing.

(7) *Final Order*. Entry of an order imposing discipline is final and appealable to the United States Court of Appeals for the Ninth Circuit.

(8) *Notice of Discipline Imposed*. The Court shall cause copies of orders and notices of public censure, suspension, disbarment, and reinstatement to be given to the Clerk of the District Court for the District of Montana, the Clerk of the Circuit Court of Appeals for the Ninth Circuit, and the appropriate disciplinary bodies in the jurisdictions in which the disciplined attorney is admitted to practice.

(m) Reinstatement.

(1) No suspended or disbarred attorney may resume practice before the Court until reinstated by order of the Court.

(2) Any attorney who has been disbarred following a hearing conducted pursuant to subsection (l), or by consent, may not apply for reinstatement until the expiration of such a period of time as the Court specifies in the order of disbarment.

(3) Any attorney suspended from practice following a hearing conducted pursuant to subsection (l) may not apply for reinstatement until the expiration of at least one-half the period of suspension.

(4) Any attorney who has been disbarred or suspended from practice pursuant to the provisions of subsection (d) may apply for reinstatement based upon a change of the attorney's status in the jurisdiction whose imposition of disci-

pline upon the attorney was the basis for imposing discipline by the Court.

(5) Petitions for reinstatement by disbarred or suspended attorneys shall be filed with the Chief Judge. Upon receipt of a petition, the Chief Judge shall set the matter for hearing by the Chief Judge or other designated judge. At such hearing, the petitioner shall have the burden of demonstrating that he or she is qualified to practice law in the District. Following the conclusion of the hearing, the Court shall enter an appropriate order.

(6) Expenses incurred in the investigation and proceedings for reinstatement may be assessed by the Court against the petitioner, regardless of the outcome of the proceedings.

(2)

No. 05-95

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LAWRENCE SUTTER,

Petitioner,

v.

STEVEN MARK LASAR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED

The Ninth Circuit upheld a contempt citation, monetary sanctions and revocation of *pro hac vice* status against Lawrence Sutter, an attorney for Ford Motor Company. Sutter made comments in his opening statement which violated pretrial orders, and omitted mention of previous contempt citations and disciplinary action in his *pro hac vice* application. The district court's local rules expressly provide for judicial use of "inherent power" in imposing sanctions.

The following questions are presented:

1. Whether a district court may rely on its inherent power to sanction when sanctioning provisions in local rules expressly allow for use of inherent power and the court first makes a finding of bad faith on the part of the sanctioned attorney.

2. Whether a contempt sanction is civil, rather than criminal, when the sanction is designed to compensate the opposing party for losses sustained as a result of the contemptuous conduct, and does not result in fines or imprisonment.

II. PARTIES TO THE PROCEEDINGS

The parties to the proceedings below included Steven M. Lasar, Ford Motor Company, and Lawrence Sutter.

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V. OPINIONS AND ORDERS BELOW

Respondent is satisfied with Petitioner's statement of opinions and orders below.

VI. JURISDICTION

Respondent is satisfied with Petitioner's jurisdictional statement.

VII. RELEVANT STATUTES AND RULES

Respondent agrees with Petitioner that the provisions of the U.S. Code and Local Court Rules are relevant. Respondent respectfully suggests that the Federal Rules of Criminal Procedure are not relevant as the sanctions in this case are not criminal.

VIII. STATEMENT OF THE CASE

This case is about a district court utilizing its inherent power as it necessarily must to protect the integrity of judicial proceedings and the sanctity of the court. Attorney Lawrence Sutter flagrantly violated orders *in limine* in his opening statement. The district court responded to this direct contempt in a manner expressly allowed in the Local Rules, which state, "Nothing contained in this Rule shall be construed to limit or deny the Court such powers as are necessary to maintain control over proceedings before it, such as contempt power." Mont. L.R. 83.14(a).

In addition, Mr. Sutter did not include the fact he had twice been found in contempt and disciplined in a previous case in his *pro hac vice* application, as he was required to do under penalty of perjury. Mont. L.R. 83.3(e)(3)(E).

While the district court considered this fact as it reflects on Mr. Sutter's character and honesty, the Ninth Circuit held as a matter of law that Mr. Sutter's conduct at trial alone was sufficient to support revocation of *pro hac vice* admission. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117. Like the contempt sanctions, the Local Rules expressly allow for such sanctioning. "Nothing in this section precludes the Court or any judge of the Court from assessing sanctions for violations of local practice and procedure rules or other applicable statutes and rules." Mont. L.R. 83.14(b).

The Ninth Circuit correctly found that the district court had acted properly under its own rules in imposing civil contempt sanctions against Mr. Sutter. The district court properly provided notice and an opportunity to be heard, all the due process which is required for civil contempt sanctions and revocation of *pro hac vice* admission.

Respondent Steven Lasar was severely injured when his Ford Ranger pickup rolled as he drove home on a rural Montana road. The pickup's door opened during the rollover, allowing Mr. Lasar to be thrown from the vehicle. Mr. Lasar brought a products liability lawsuit against Ford Motor Co., alleging that the latch mechanism on the Ranger's door was defective.

Mr. Lasar successfully moved *in limine* to have evidence that he was not wearing a seatbelt, and may have consumed a modest amount of alcohol prior to the accident, ruled inadmissible at trial. The court's exclusion of seatbelt evidence was based on Montana's seatbelt statute, which states evidence of failure to comply with the seatbelt requirement is not admissible in any civil action.

Mont. Code Ann. § 61-13-106 (2001). Exclusion of evidence Mr. Lasar consumed some alcohol prior to the accident was based on the fact there was no causal connection between Mr. Lasar's modest drinking and the accident, a fact conceded by Ford Motor Co. Testing after the accident revealed Mr. Lasar's blood alcohol was well below the legal limit, in fact negligible, and testimony of friends and a highway patrol officer indicated he was not intoxicated.

Mr. Sutter was admitted *pro hac vice* as counsel for Ford Motor Company in this case. Despite the rulings of the court, Mr. Sutter offered the following comments in his opening statement regarding Mr. Lasar's behavior prior to the accident:

> At about 5:00 that morning, Mr. Lasar got out of bed and went hunting for the morning. Some time in the afternoon, he met up with some of his friends and spent the day playing pool, visiting some local establishments. Somewhere around 10:00 that night, he made the decision to drive himself home. He got into his car and he began his way back to his homestead.

As the district court emphasized:

> . . . '[w]hat this record does not show is the tone and inflection of Mr. Sutter's voice.' Even the record, however, suggests a calculated attempt to introduce evidence that Lasar was drinking before the accident.

Lasar, 399 F.3d at 1114-15.

Later, regarding the accident itself, Mr. Sutter stated: "Now, inside the vehicle, something else was going on; Lasar was what we call a free-floating body. His body was banting about inside the car as it was rolling over."

Counsel for Mr. Lasar requested a sidebar with the court following Mr. Sutter's opening statement. The district court did not permit Lasar to present his objection until the end of proceedings for the day. There, Lasar argued that Sutter's comments in the opening statement amounted to violations of the orders *in limine*. Lasar's counsel initially suggested a curative instruction, though noting attempting to correct the problem would simply draw attention to it.

The district court stated Sutter's statements were "absolutely unacceptable violations of the orders in limine . . . " and offered to grant a mistrial and award Lasar costs. However, the district court offered Sutter an opportunity to respond before making a decision. Sutter claimed he had carefully crafted his statement about Lasar playing pool at local establishments to be ambiguous, and further claimed it was impossible to describe the accident without referring to Lasar's body as free floating. Counsel for Lasar then requested a directed verdict, which the district court denied because "Ford has a legitimate defense."

The following morning, Lasar moved for mistrial. The district court heard additional oral argument before determining that a curative instruction would not "overcome the prejudice" caused by Sutter's comments. Accordingly, the Court granted Lasar's motion for mistrial.

The district court informed the parties it was considering monetary sanctions " . . . based on 'an intentional effort, reckless and in bad faith . . . to ignore the court's orders . . . '". *Lasar*, 399 F.3d at 1106. The Court then ordered counsel for Lasar to detail his costs and attorney's fees for the two weeks prior to trial in an affidavit. The court also stated that it would issue an order to show

cause why Sutter should not be held in contempt and lose his *pro hac vice* status.

The sanctions hearing was held two days later. At this hearing, Sutter chose to testify even after the district court advised him he would be subject to cross-examination if he testified. Sutter volunteered three separate times that he had been held in contempt and incarcerated in the matter of *Kaffeman v. Maclin (In re Disqualification of Cleary)*, 723 N.E.2d 1106 (Ohio 2000). The court asked Sutter why he had not disclosed this information on his *pro hac vice* application. Sutter responded that he thought such disclosure was only required if he had been sanctioned by a bar association or an investigatory body. The court then noted that the Local Rules required disclosure of a holding of contempt or any discipline by any court. Sutter then changed his story, stating "I told John Stephenson [local counsel for Ford] two days ago that I had never been held in contempt, *and I truly believe that to be true.*" Sutter's reasoning was that the judge who twice held him in contempt was later removed from the case, and he had never actually been disciplined. The district court acknowledged Sutter's position, but reasserted the Local Rule's requirements.

In its opinion, the district court based its contempt citation and the accompanying sanctions on Sutter's references to alcohol use, which clearly violated the order *in limine* on this issue. It noted that despite Sutter's contentions, because he had actually testified to being twice held in contempt in the case *Kaffeman*, it was very unlikely he believed that he had never been held in contempt.

The Petitioner goes to great length in an attempt to characterize Chief Judge Donald W. Molloy as a biased jurist, who embarked on a personal vendetta against Sutter. (Petition for a Writ of Certiorari, p. 6.) He further implies Judge Molloy was biased against Sutter due to his *pro hac vice* status. Petitioner even cites a case, *Cyphers v. Fuji Heavy Indus. Co.*, 32 F. Supp. 2d 1199 (D. Mont. 1998), stating "published opinion denying admission *pro hac vice* to out-of-state product liability law firm Bowman and Brooke." (Petition for a Writ of Certiorari, p. 9) (parentheses omitted). This statement is misleading. Judge Molloy actually admitted Mr. Bowman *pro hac vice*, and was prepared to admit two associates of the firm pending their agreement to do all work on the case personally and pending proper *pro hac vice* applications. *Cyphers*, 32 F. Supp. 2d at 1202. Judge Molloy simply declined to admit the entire firm of Bowman and Brooke, based on flagrant abuses of the litigation process the firm committed in a previous Montana trial, conduct which Mr. Bowman himself acknowledged "is mortifying." *Id.* at 1201.

Judge Molloy was not biased against Sutter. Sutter violated two orders *in limine*, resulting in a mistrial. Sutter was provided with the civil due process requirements of notice and hearing. The monetary sanctions imposed merely compensated Lasar and the court for a portion of the expense of preparing for trial, and sanctioned Sutter for a deliberate, direct violation of a court order during trial. Petitioner's attempts to characterize Judge Molloy as unfair, and the forum as biased toward Sutter, are not supported by the record.

IX. SUMMARY OF THE ARGUMENT

Certiorari is granted only for compelling reasons. The differences of approach to a court's use of its inherent power to sanction is one of procedure which does not rise to the level of importance which requires resolution by this Court. The Third and Fifth Circuits require a district court to first find that sanctioning provisions in the statutes and rules are not fully adequate before using inherent power. The Sixth and Ninth Circuits require an express finding of bad faith and a use of informed discretion, including consideration of provisions in rules and statutes, before a district court uses its inherent power to sanction. Both approaches are based upon a reasonable interpretation of this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), and serve to adequately regulate the use of inherent power. This Court does not resolve conflicts among the Courts of Appeals which are simply administrative or managerial. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Petitioner's second question for review, claiming a conflict between the D.C. Circuit and the Ninth Circuit on whether a free-standing contempt citation is civil or criminal, is simply a non-issue. A careful reading of the cases in question reveals that no conflict exists. Both circuits agree that the "character and purpose" of the contempt citation determines whether it is criminal or not, and utilize the same analysis. The factual differences in the cases lead to the differing findings. It is only through an incomplete reading of the cases which considers only one of the two factors that Petitioner is able to claim a conflict exists.

X. ARGUMENT

A. Introduction.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. Rule 10. It is a rare issue which merits consideration by this Court.

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

The careful and consistent use of stringent standards of discretion in granting certiorari is critical to this Court as an institution.

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeals.

Rice, 349 U.S. at 79 (citation omitted) (emphasis added).

Thus, this Court conscientiously limits review of conflicts in the Courts of Appeal. "[This Court's] function in resolving conflicts among the Courts of Appeals is

judicial, not simply administrative or managerial." *The Monrosa*, 359 U.S. at 184.

B. The Disagreement Between The Circuits Does Not Rise to The Level of Importance Required for This Court's Review.

This Court has noted the challenges of contempt power. This power of the courts has long been recognized as necessary "to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. . . ." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821)). Indeed, without contempt authority, exercise of any of the roles of the courts would be impossible. However, while necessary, contempt authority can be problematic, as the judge alone is "responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Bagwell*, 512 U.S. at 831. Thus, the potential for abuse is great.

This Court has attempted to balance the necessities and risks of inherent contempt authority. Jurisprudence allows:

> . . . a relatively unencumbered contempt power when its exercise is most essential, and requir[es] progressively greater procedural protections when other considerations come into play. The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court.

Bagwell, 512 U.S. at 832.

The bases for invoking the inherent power to sanction include: "willful disobedience of a court order . . . or when the losing party has acted in bad faith . . . " and "against counsel who willfully abuse judicial processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) (internal quotation marks and citations omitted).

Exactly when a court may invoke its inherent power to sanction is explored in *Chambers*. The portion of this opinion which lays out the general rule states:

> But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Chambers, 501 U.S. at 50.

In *Chambers*, this Court affirmed a district court's assessment of nearly one million dollars in sanctions for a party's bad-faith conduct during litigation. The sanctions were to compensate the opposing party for attorney's fees and costs, and were imposed under the court's inherent power. *Id.* at 30.

Pursuant to *Chambers*, in the Ninth and Sixth Circuits, a court may rely on its informed discretion in utilizing its inherent power to sanction, if it has first made an express finding of bad faith. *See Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501 (6th Cir. 2002). This reading of *Chambers* focuses first on finding bad faith, and then allows the court to exercise its informed discretion. Such a reading is consistent with the important language of *Chambers*.

While the court is not required to first find that sanctioning provisions in statutes and the Rules are inadequate before using its inherent power to sanction, the bad faith requirement is an effective restraint on the use of inherent powers. *See United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986) (imposition of sanctions on tardy attorney reversed for lack of bad faith conduct); *Zambrano v. City of Tustin*, 885 F.2d 1473, 1485 (9th Cir. 1989) (sanctions vacated because sanctioned conduct was negligent failure to comply with local rules); *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) (sanctions vacated because there was no evidence of bad faith on part of attorney).

The Third and Fifth Circuits require that the sanctioning provisions in the statutes and Rules be inapplicable or inadequate before a court turns to its inherent power. *See Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 293 (5th Cir. 1997) (sanction upheld were statutes and rules did not "squarely contemplate sanctions payable to the court for disruptive behavior"); *Klein v. Stahl GMBH & Co. Maschinefabrik*, 185 F.3d 98, 110 (3rd Cir. 1999) (district court's application of judicial estoppel, pursuant to inherent power, vacated and remanded for

determination whether less extreme sanctions under the rules or statutes were sufficient). This approach emphasizes different *Chambers* language than the Sixth and Ninth Circuits approach, focusing on whether existing rules and statutes have adequate sanctioning provisions. However, this approach overlooks the bad faith language, and does not require a finding of bad faith conduct precedent to any invocation of inherent powers.

Both of these readings of *Chambers* are credible. In addition, both have effective, if differing, checks on the use of inherent power. The Sixth and Ninth Circuits require a finding of bad faith, and the Third and Fifth Circuits require a determination that existing sanctioning provisions in the statutes and rules are not up to the task. Because both approaches are faithful to the original opinion, and have measures to prevent abuse, the matter of difference is more procedural than substantive. This Court has stated that a writ of certiorari should not be granted except "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice*, 349 U.S. at 79. The difference in the case at bar does not rise to this level. The Petition for a Writ of Certiorari should be denied on this issue above.

C. There Is No Genuine Conflict Between the D.C. and Ninth Circuits on Whether a Free-Standing Contempt Citation Is Criminal in Nature.

Petitioner notes that the D.C. Circuit has held in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), that a free-standing contempt citation, is criminal in nature. Although there are similarities between the contempt

citation in *Cobell* and the instant case, these cases can be distinguished in two critical respects. First, unlike *Lasar*, the contempt in *Cobell* was not combined with compensation for the opposing party. Second, the conduct sanctioned in *Cobell* did not occur in the presence of the court.

"A contempt proceeding is either civil or criminal by virtue of its 'character and purpose'. . . ." *Cobell*, 334 F.3d at 1145 (*citing Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 (1994); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Civil contempt most commonly is utilized to compel compliance with a court order, but may also be designed to compensate the party aggrieved by the contumacious conduct. *Cobell*, 334 F.3d at 1145. "By contrast, criminal contempt is used to punish, that is, to 'vindicate the authority of the court' following a transgression rather than to compel future compliance or to aid the plaintiff." *Id.* (quoting *Bagwell*, 512 U.S. at 828.)

In *Cobell*, the district court held the defendants in contempt for litigation misconduct, failure to comply with a court order, and committing "fraud on the Court" in four different ways. *Cobell*, 334 F.3d at 1145. The behavior leading to the contempt consisted primarily of allegedly failing to undertake an "Historic Accounting Project" as ordered by the court. *Id.* at 1147. The court noted that "the nature of the contempt is obscured by the lack of any clear sanction." *Id.* at 1145. In addition, no relief seemed to have been granted to the plaintiff.

> In fact, other than an award of expenses the plaintiffs incurred in the contempt trial – which cannot be considered relief for the underlying contempt – the only relief granted which could conceivably be based upon the findings of contempt

> are the initiation of the Phase 1.5 proceeding and the appointment of the Special Master.

Cobell, 334 F.3d at 1145-46 (citations omitted). The *Cobell* contempt was based on conduct which did not occur in the presence of the court, and did not provide relief or compensation to the plaintiffs.

The contempt in the instant case was based upon conduct which occurred in the presence of the court, and was coupled with sanctions clearly designed to compensate the plaintiff. Sutter violated a court order before the court, in the midst of trial. In addition, the monetary sanctions which were coupled with the contempt citation were designed to compensate Lasar for the actual losses sustained as a direct result of the contempt. On these important grounds, the instant case is far different from *Cobell*. Petitioner's contention that "[t]he Ninth Circuit's holding directly conflicts . . . " with *Cobell* is erroneous. Petitioner's claim that the contempt citation "was free-standing, in that it was not linked to any particular sanction or punishment . . ." is remarkable, given that the citation was accompanied by compensatory monetary sanctions tied directly to the expenses Lasar incurred in the two weeks before trial.

It is true that aspects of the *Lasar* contempt have characteristics of a criminal contempt. It was based upon completed conduct, and Sutter cannot fairly be said to have had an opportunity to escape the contempt and sanctions by compliance. Ultimately, the Ninth Circuit decided that though the monetary sanctions had "some attributes of criminal sanctions" these sanctions were civil because they were "designed to compensate Lasar for unnecessary costs and attorney's fees and to reimburse the

district court for the jury costs incurred as a result of the mistrial." *Lasar*, 399 F.3d at 1111. Because the sanctions were compensatory and civil, Sutter's contempt citation was not accompanied by criminal fines or a sentence of imprisonment.

There is very little support for the prospect that a contempt citation unaccompanied by criminal fines or a sentence of imprisonment can be criminal in nature. Petitioner has cited only *Cobell* in support of its position. However, as *Cobell* recognizes, a contempt citation is criminal or civil based upon "its character *and* purpose." The court in *Cobell* went on to note that the contempt citation in that case was unaccompanied by any compensatory sanctions. Having determined that the *purpose* of the contempt was not compensatory, the court went on to explore the *character* of the citation. It is this analysis that Petitioner cites for the proposition that because the contempt citation was punitive rather than remedial, it was criminal in nature. However, the D.C. Circuit reaches this conclusion only after determining that the contempt was free-standing.

In *Lasar*, by contrast, the contempt citation is coupled with compensatory monetary sanctions. Thus, while the Ninth Circuit acknowledged that aspects of the contempt were criminal in *character*, the overriding *purpose* of the contempt was compensatory. Here,

> . . . the court imposed monetary sanctions against Ford and Sutter because Sutter 'intentionally and in bad faith' violated the in limine orders and monetary sanctions were 'necessary to reimburse Lasar and the Court [and] . . . to vindicate the Court's authority and to ensure

> that Ford, through its lawyers, will not disregard or attempt to circumvent court orders in this or any other case.'

Lasar, 399 F.3d at 1107 (*quoting Lasar v. Ford Motor Co.*, 239 F. Supp. 2d at 1027, 1031).

Cobell and *Lasar* are not in "direct conflict" as Petitioner claims. It is only through an oversimplification of the reasoning of both courts that Petitioner can draw this conclusion. A more complete reading shows that both courts considered both the character and the purpose of the contempt citation, and the very different factual background of both cases lead to opposite results. *Cobell* and *Lasar* can and should be read as completely consistent with each other.

XI. CONCLUSION

This Court should deny certiorari in this case. Both of Petitioner's arguments are unavailing. The Circuit split petitioner cites is a minor difference over the procedures necessary before a court's inherent power to sanction may be used. This discrepancy is one of form rather than substance, and is not the sort of "compelling reason" this Court grants certiorari for. Petitioner's second argument that the D.C. Circuit holding in *Cobell* and the Ninth Circuit holding in *Lasar* are in direct conflict is simply erroneous. A full reading of these cases shows that both courts based their reasoning on the same criteria and reached opposite results because the cases were factually very different. *Cobell* and *Lasar* are

amenable to a completely consistent reading, and thus certiorari is not warranted on this issue either.

Respectfully submitted,

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No. 05-95

IN THE

Supreme Court of the United States

LAWRENCE SUTTER,

Petitioner,

v.

STEVEN MARK LASAR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute petitioner's central argument: that the circuits have split over whether a district court may rely on its inherent power to sanction where the conduct may be fully addressed under the sanctioning provisions in statutes or rules. Indeed, respondent explicitly concedes the existence of a circuit split on this question, *see* Opp. 7, 9-12, 16, but contends that the issue "does not rise to the level of importance which requires resolution by this Court." Opp. 7.

Respondent is mistaken. As discussed below, this is a significant question of law that has great importance to courts and practitioners alike, and fully merits plenary review by this Court. Under the current state of the law, when an attorney appearing in district courts within the Third or Fifth Circuits is threatened with sanctions, and there exists a statute or local rule that can fully address the conduct in question, the statute or local rule—including the accompanying procedural protections—must be applied. But when the same situation occurs in district courts within the Sixth or Ninth Circuits, those courts have the option to disregard the sanctioning provisions in statutes and local rules—and the procedural protections contained therein—simply by proclaiming their use of the inherent power "appropriate" in the particular case, as the district court did here. Pet. App. 21a. As petitioner has shown, Pet. 10-12, these conflicting approaches result from the circuit courts' differing interpretations of *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), and only this Court can now dispel the confusion and uncertainty.

Review is further warranted to resolve the conflict between the decision below and the D.C. Circuit's ruling in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), which held that stand-alone contempt citations like the one imposed in this case are criminal rather than civil in nature. Respondent admits that "[i]t is true that aspects of the *Lasar* contempt have characteristics of a criminal contempt," Opp. 14, but contends that *Cobell* is factually distinguishable because

the sanction in this case supposedly was compensatory, whereas the sanction in *Cobell* was punitive. This purported "distinction" is meritless. Just as in *Cobell*, the district court's contempt citation was not linked to any compensatory sanction, but rather was an independent, stand-alone sanction that was intended to punish, stigmatize and reprimand Mr. Sutter. The D.C. Circuit has squarely held that these types of contempt sanctions are criminal rather than civil in nature, and certiorari is warranted to resolve this conflict as well.

I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER THE INHERENT SANCTIONING POWER.

Petitioner and respondent agree that the circuits are split over the proper interpretation of *Chambers*. The Ninth and Sixth Circuits permit reliance on the inherent power even when statute- and rule-based sanctions are available and fully adequate. The Third and Fifth Circuits, in contrast, permit reliance on the inherent power only when statutes or rules are incapable of reaching the conduct at issue. *See generally First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 534 (6th Cir. 2002) (Gilman, J., dissenting) (canvassing caselaw and recognizing circuit split).

Respondent contends that this circuit split is unworthy of this Court's attention, characterizing the question as "simply administrative or managerial" and asserting that "the matter of difference is more procedural than substantive." Opp. 7, 12. These arguments make little sense. Not only have the circuits visibly split over the proper interpretation of a major decision of this Court, but the practical ramifications are highly significant. Simply put, the question presented is whether the sanctioning provisions and procedures in statutes and local rules are mandatory or optional in cases where they are capable of reaching the conduct at issue. Even if, as respondent contends, both sides of the split have articulated "credible" readings of *Chambers*, Opp. 12, that just under-

scores the need for this Court to grant review and determine which side is correct.

This case dramatically demonstrates the difference between the conflicting approaches. The district court sanctioned Mr. Sutter for allegedly omitting material information from his *pro hac vice* application in violation of District of Montana Local Rule 83.14(b)(5). But the district court did not afford Mr. Sutter the many protections contained in Local Rule 83.14(f)-(*l*), the provisions establishing the *procedure* for sanctioning violations of Local Rule 83.14(b)(5). Instead, the court, citing *Chambers*, relied on its inherent power. The Ninth Circuit affirmed, holding that the district court was free to bypass the sanctioning procedures in its Local Rules whenever it deemed them not "appropriate" in a particular case. Pet. App. 21a.

Under the approach followed in the Third and Fifth Circuits, the district court could not have sanctioned Mr. Sutter under its inherent power. Rather, because there exists a Local Rule specifically governing omissions in *pro hac vice* applications, it would have had to follow the procedures set forth in Local Rule 83.14(f)-(*l*), and appointed an independent investigator and, if the results of the investigation so warranted, an independent counsel. *Cf. In re Thalheim*, 853 F.2d 383, 388-89 (5th Cir. 1988) (reversing sanction where district court bypassed local rules requiring the appointment of an independent investigator and independent prosecutor).

The approach followed by the Ninth and Sixth Circuits makes it impossible to know in advance the law that will govern allegations of sanctionable conduct, and creates a substantial risk of unfair and arbitrary rulings. In one case, a court may decide to afford an attorney the extensive procedural protections contained in the local rules. In another case, the same court may, without explanation, deny those protections to an attorney on grounds that the local rules are simply not "appropriate." As respondent admits, a district court's sanctioning authority can be "problematic" and "the potential for abuse is great" where, as here, "the judge alone

is 'responsible for identifying, prosecuting, adjudicating, and sanctioning'" the conduct at issue. Opp. 9 (quoting *Int'l Union, UMW v. Bagwell*, 512 U.S. 821, 831 (1994)).[1]

Respondent insists that the ruling below was consistent with the Local Rules because "[t]he district court's local rules expressly provide for judicial use of 'inherent power' in imposing sanctions." Opp. i. But the Local Rules for the District of Montana do not actually mention the "inherent power." To the extent respondent is relying on two provisions in Local Rule 83.14, neither provision is relevant here. Local Rule 83.14(a) provides that "[n]othing contained in this Rule shall be construed to limit or deny the Court such powers as are necessary to maintain control over proceedings before it, such as contempt power." But Mr. Sutter's alleged conduct was not disruptive and obviously did not threaten the court's ability to "maintain control"—nor was reliance on the inherent power "necessary" given the sanctioning provisions in the Local Rules, which plainly were "up to the task" of addressing the purported omission in Mr. Sutter's application. *Chambers*, 501 U.S. at 50.

Although Local Rule 83.14(b) provides that "[n]othing in this section precludes the Court or any judge of the Court from assessing sanctions for violations of local practice and procedure rules or other applicable statutes and rules," petitioner is not contending that the district court was *precluded* from assessing sanctions for a violation of the Local Rules. Rather, petitioner is arguing that the district court should

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[1] Respondent takes issue with a "see also" citation in the petition, contending that it is "misleading" to characterize *Cyphers v. Fuji Heavy Industry Co.*, 32 F. Supp. 2d 1199 (D. Mont. 1998), as a "published opinion denying admission *pro hac vice* to out-of-state product liability law firm Bowman and Brooke." Opp. 6. But that is exactly what this case holds, and it illustrates the dangers out-of-state attorneys can confront when seeking admission to an unfamiliar federal court. *Cf. Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (purpose of diversity jurisdiction "was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides").

have followed the sanctioning *procedures* in the Local Rules for the alleged *violation* of the Local Rules. In short, even assuming that these provisions "preserve" the district court's inherent power to sanction, the question presented by the instant petition is whether that inherent power may be exercised absent a determination that the statutes and local rules are not "up to the task."

Respondent also contends that the Ninth Circuit remarked that "Mr. Sutter's conduct at trial alone was sufficient to support revocation of *pro hac vice* admission." Opp. 2. But the district court never made this determination. Moreover, even if the district court *had* made this determination, and invoked its inherent power to revoke Mr. Sutter's *pro hac vice* admission based on his alleged violation of the orders *in limine*, such a ruling would have implicated the same questions raised in the instant petition because, as the court itself acknowledged, the Local Rules also "allow[ ] the court to sanction an attorney for violating a court order," and thus reliance on the inherent power would not have been necessary. Pet. App. 37a.

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT REGARDING NONCOERCIVE, NONCOMPENSATORY CONTEMPT CITATIONS.

Respondent strives to downplay the conflict between the decision below and the D.C. Circuit's decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), contending that *Cobell* is distinguishable. Respondent offers two bases for distinction. Neither has merit.

First, respondent asserts that this is a case where the contempt citation was "combined with compensation for the opposing party," thus rendering the sanction civil rather than criminal in nature. Opp. 13. But respondent's argument is contradicted by the district court's opinion, which makes abundantly clear that the contempt citation was a stand-alone punishment that was *not* "combined with" the monetary sanctions. Section III(A) of the district court's opinion is entitled

"Sanctions" and imposes monetary sanctions against Mr. Sutter and Ford (Pet. App. 38a-44a). Section III(B) is entitled "Contempt" and imposes a contempt citation against Mr. Sutter. The "Sanctions" section does not make any mention of contempt, and the "Contempt" section does not make any mention of monetary sanctions. Moreover, the "Conclusion" section begins with a paragraph ordering Ford and Mr. Sutter to pay monetary sanctions, then states in a separate paragraph that "IT IS FURTHER ORDERED that Lawrence A. Sutter is in contempt of court for violating the Court's order in limine regarding alcohol." Pet. App. 52a. Exactly as in *Cobell*, the contempt citation did not furnish the predicate for the monetary sanctions, and the "exceedingly strong words [the district court] used in finding [Mr. Sutter] in contempt . . . suggest the court intended the adjudication and accompanying opinion to serve as a reprimand." *Cobell*, 334 F.3d at 1146.

Second, respondent asserts that "the conduct sanctioned in *Cobell* did not occur in the presence of the court." Opp. 13. But respondent nowhere explains why this fact would have any legal significance. The contempt sanction in this case was *not* imposed as a summary contempt pursuant to Federal Rule of Criminal Procedure 42(b)—which allows a court to punish petty contempts that occur in the court's presence—nor could it be sustained as one. *See In re Gustafson*, 650 F.2d 1017, 1022 (9th Cir. 1981) (summary contempt proceedings may only be used in "exceptional circumstances" and "where instant action is necessary to protect the judicial institution itself").

Respondent admits that "[i]t is true that aspects of the *Lasar* contempt have characteristics of a criminal contempt" in that "[i]t was based upon completed conduct, and Sutter cannot fairly be said to have had an opportunity to escape the contempt and sanctions by compliance." Opp. 14. These undisputed facts establish that, under this Court's decision in *Bagwell*, the contempt was criminal and Mr. Sutter should have been afforded the procedural and substantive protections that attach in a criminal proceeding. *See Bagwell*, 512

U.S. at 827 (whereas criminal contempt is based on a completed act and intended to vindicate the authority of the court, civil contempt is "considered to be coercive and avoidable through obedience"). The D.C. Circuit was therefore correct in holding these types of punitive contempts—predicated on completed conduct and unavoidable through obedience—to be criminal in nature. This Court should grant review, reject the Ninth Circuit's approach, and hold that courts cannot impose punitive and stigmatizing sanctions under the guise of mere "civil" contempts.

CONCLUSION

The strong language in the district court's order was intended to serve as a public reprimand of Mr. Sutter. The order and the contempt citation continue to damage his career, as his opponents routinely introduce the order in opposing his efforts to gain admission *pro hac vice* in jurisdictions throughout the nation. The district court's disregard of its own Local Rules in favor of its inherent power directly implicates a circuit split, and demonstrates the dangers of an unchecked inherent power to sanction.

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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